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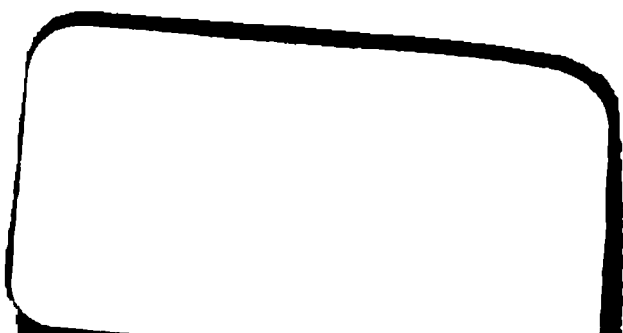
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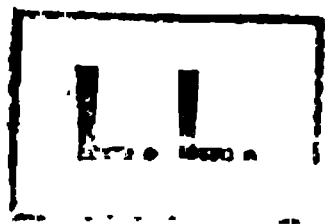
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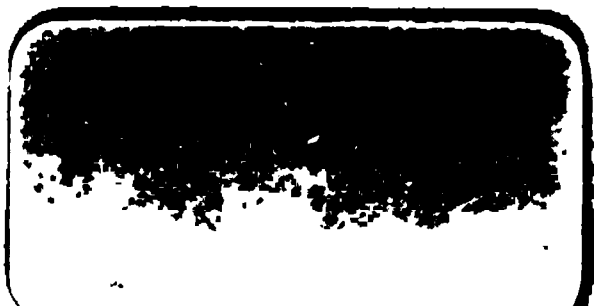
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## I.—COLLISIONS AT SEA: A SCHEME OF INTERNATIONAL TRIBUNALS.

THE application of steam-power to sea-going vessels has worked so great a change in the conditions of ocean navigation as to render it necessary for nations to concert a common system of rules for the navigation of vessels on the high seas, with a view to prevent accidents from collision. It is obvious that the two ancient cardinal rules of navigation, which had hitherto sufficed for the guidance of sailing vessels on the high seas, namely, that vessels going free should give way to vessels on a wind, and that the vessel on the port tack should always give way to the vessel on the starboard tack, are insufficient for the safe guidance of vessels navigated under steam-power, and not under sail. Although the same principles of navigation might still be properly maintained in the case of steamers, where applicable, it has been found requisite that the rules of navigation should be extended to other cases, seeing that the course of steamers is not governed exclusively by the wind, and that a steam vessel is enabled by a skilful use of her steam-power to manœuvre in a manner which is impracticable for a sailing vessel. Great Britain was amongst the leading states to set the example. She commenced by laying down formal rules for the navigation of steam vessels on her own rivers, and after some experience, extended the rules to her own steam vessels on the

high seas, and she included her sailing vessels under a reciprocal system of obligation when approaching steam vessels. British Admiralty Courts were also authorised by British statute law to regulate their judgments in cases of collision between British vessels on the high seas in accordance with the new rules. In due course of time, after experience had given its sanction to those rules, Great Britain entered into treaty arrangements with foreign powers, that their vessels should be navigated on the high seas under the same system of rules, and she has authorised her Admiralty Courts to apply the new rules to every vessel whose flag has been brought, with the consent of its Government, within the operation of the new rules. Cases of collision on the high seas have thus been brought by a common international concert under a new system of law, which has been built up on the lines of the ancient customs of the sea as far as possible, the steam vessel being regarded as a vessel going free, and able to get out of the way of a sailing vessel, more readily than a sailing vessel can get out of the way of a steam vessel. It is not proposed, on the present occasion, to discuss the details of the International Sailing Rules. Modifications have had to be made in them from time to time to meet new difficulties which experience has discovered, and such modifications have been the result of a common concert between the maritime powers. Our object at present is to consider how the observance of the sailing rules on the high seas can be best secured, and how the neglect of them, if it be the result of carelessness or of wilfulness, may be most effectively punished.

Under the ancient law of the sea, every collision on the high seas may be the subject of a civil action for damages in any Admiralty Court; but however culpable may have been the conduct of those in charge of either vessel, British Admiralty Courts, which exercise their civil jurisdiction indiscriminately between vessels of all nations, care-

fully abstain from exercising any criminal jurisdiction over the crews of foreign vessels in respect of their neglect to observe the sailing rules, nor has Great Britain been empowered by any treaty arrangement with foreign states to authorise her Courts to exercise any such criminal jurisdiction. Yet it would seem to be in accordance with reason, that where states have agreed upon a common system of rules of navigation for the prevention of collisions on the high seas, they should agree upon a common system of penalties for the non-observance of those rules on the part of the persons, who may have been in charge of the navigation of any vessels which have come into collision on the high seas. This common concert is the more necessary, because the modern theory of a ship being the territory of the nation, under whose flag it sails, would otherwise be in the way of the tribunals of any other nation exercising corrective jurisdiction over those on board of the ship in respect of any misconduct on their part whilst the vessel is on the high seas. The personal responsibility of mariners who navigate the high seas remains, in regard to foreign nations, precisely such as it was before any sailing rules were agreed upon amongst the maritime powers ; in fact, the mariner has no personal responsibility towards the owner or crew of any foreign vessel with which he may bring his own vessel into collision on the high seas, unless his act should be done with a malicious intention to destroy the other vessel, which may clothe it with a piratical character.

The ancient law of the sea, which is universally received amongst civilised nations, regards ships as chattels, the management of which on the high seas is not so thoroughly under the free control of the owner or his servants, inasmuch as the sea is a treacherous element, that he or they should be held criminally responsible for any damage caused by one ship to another ship in the course of navigation. The owner of the ship, however, in the case of a collision, is not allowed by the law of the sea to escape scot-free, if his



servants mismanage his vessel on the high seas, and through their unskilfulness bring about the collision with another vessel. The ship itself in such a case may be arrested by the process of any Admiralty Court, and if the servants of the owner are found to have mismanaged her navigation, and by such mismanagement to have brought her into collision with the other vessel, the owner may be amerced in the value of his ship, which may be sold by an order of the Admiralty Court, if the owner is otherwise unable to satisfy the judgment of the Court. This result is brought about by what is termed an *actio in rem*, a tradition of the ancient Roman law. It is totally opposed to the territorial theory of a ship, which is of modern origin, and has been devised as a convenient fiction to explain the subjection of the ship and its crew to the municipal law of the country under whose flag it is navigated. But this theory, like everything else which rests on a fiction, has its inconvenience. Whilst it is useful for maintaining discipline on board of a ship when it is on the high seas, which are *nullius territorium*, it may be mischievous if it secures territorial impunity to the master and crew in the management of their vessel, in its relation to other vessels on the high seas.

The international responsibility of mariners, under which term may be included all persons engaged in the navigation of a ship, is thus in fact of a negative character; they are taken to be the agents of the owner or of the charterer of the ship, as the case may be, and their employer is responsible for any mismanagement on their part of the navigation of his vessel. The owner or the charterer, on the other hand, under the modern system of marine insurance, is able to shift his risk, which is strictly pecuniary, on to the shoulders of the underwriter; and the underwriters are the parties in the present day, who institute and defend actions *in rem* in most causes of collision, which are brought into the

Admiralty Courts. There may be thus no direct *solidarité*, to use a convenient French phrase, between those who are employed in the navigation of a vessel on the high seas and those upon whom the burden of compensation falls, in case the navigation is mismanaged, and a collision takes place with another vessel. The question becomes still more complicated where loss of life ensues, of which several painful instances have occurred of late, in which the magnitude of the calamity has been so appalling, as to awaken a general demand for some legislation on the subject, by which the feeling of personal responsibility may be brought home to the mariner, and may stimulate him to greater watchfulness and greater care in avoiding all chances of collision with other vessels.

There arises thus for the consideration of Governments the important question of Criminal Jurisdiction in cases of collision, how best it may be exercised, and under what safeguards, where the collision has happened on the high seas. It seems reasonable that states which have formally agreed that certain rules of navigation shall be observed by their respective subjects in navigating the high seas, and which have entrusted to their Courts of Admiralty or to maritime tribunals of equivalent authority within their respective dominions civil jurisdiction, in respect of damage to property resulting from the neglect of those rules, should authorise the same Courts to punish mariners, who transgress those rules and thereby bring about the damage. The measure of punishment, however, in such cases ought not to be regulated by an arbitrary law of the state, before whose tribunal the parties happen to be convened, but by a *common law* concerted by the same states, which have adopted the revised rules of navigation as the common law of the sea. There is something peculiar to accidents on the sea, something which gives to every collision on the high seas a tinge of misfortune. The navigation of the high seas is in some respects dependent on

“the snares of fortune,” to use a phrase familiar to Bracton. That great master of the common law of England, draws a wide distinction between homicide with a purpose and homicide as a result (*ex eventu*), and according to this distinction homicide is either a felony or a misfortune. Our ancestors seem to have thought that any homicide in former days, which was the result of a collision on the high seas between sailing vessels, where there was no felonious intent on either side, might be properly regarded as homicide by misfortune (*homicidium per infortunium*). The question in the present day is whether the application of steam-power to ocean navigation has not so altered its conditions, as to warrant us in introducing a more complete theory of personal responsibility where steam vessels have come into collision with one another on the high seas. The collision between the German steam vessel *Franconia* and the British steam vessel *Strathclyde* in the open sea within a marine league of Dover pier has been thought by many persons to establish the necessity of some international concert for the punishment of those, who have transgressed the rules of navigation in cases, where the vessels brought into collision are of different nationalities. The degree of culpability, however, will always be a very delicate question to determine, of which instances are at hand in the loss of H.M. steamship *Vanguard* by a collision with a consort steamship in a fog, and the loss of the Imperial German steamship *Grosser Kurfürst* by a collision with a consort steamship in broad daylight. Still such anomalous collisions, although they may bespeak caution, are not dissuasive of all legislation, and the subject is one which is likely to attract every day more attention, if collisions between steamships on the high seas continue to multiply at their present rate.

Since the above observations, or observations to a similar effect, were addressed to the Conference of the Association for the Reform and Codification of the Law of Nations, which met at Frankfort-on-the-Maine in August

last, a collision has occurred on the River Thames between two British steam vessels, the *Princess Alice* and the *Bywell Castle*, whereby some hundreds of passengers on board of the former vessel were drowned almost instantaneously. In this case, if negligence in the navigation of either vessel should be established, the culpable party will be liable to punishment according to British law, but collisions of equal gravity may occur on the high seas, where British law is not supreme *ratione territorii*. An instance of such a collision may be cited in the case of the steamship *Camilla* and the barque *Elizabeth Barnett*, in which nearly three hundred and fifty living emigrants disappeared in a moment in the deep waters of the Atlantic Ocean, whilst the steamship hurried onward across the midships of the barque in a dense fog, hardly conscious of a collision, had it not been for the sudden apparition of half-a-dozen strange mariners, who had clambered up her bows, as the steamer passed over the ill-fated sailing vessel. Similar disasters are of frequent occurrence on the high seas, and where the colliding vessels are of one and the same nationality there would be no difficulty in applying the penal provisions of municipal law to cases of culpable non-observance of the international sailing rules. The difficulty arises where the colliding vessels are of different nationalities, and where the vessel that has kept afloat has sought refuge in a foreign port. Such an instance is at hand in the case of the Scotch steamship the *City of Manchester* and the French steamer *Moselle*, which came into collision with each other on the broad waters of the Mediterranean Sea, at the distance of about eight miles from the Spanish coast, on the night of 21st August last, in bright moonlight and in fine weather. The *Moselle*, in this case, was struck on the port midships, and sank in a few minutes. Two of her crew were drowned, the rest having been picked up some time after the collision by the boats of the *City of Manchester*, which was obliged, in consequence of the damage

which she had received on her bows, to discontinue her voyage to Calcutta, and to put into the Spanish port of Almeria. It was competent for the owners of the French vessel to have at once arrested the Scotch vessel by Admiralty process in the port of Almeria for the damages incurred by them as the owners of the *Moselle*, but under the practice of nations, the Admiralty Courts of Spain could not exercise any penal jurisdiction over the crew of either vessel for neglect of the international rules of navigation, although the collision should have been occasioned by neglect of those rules. This is not a satisfactory state of things as regards the navigation of the high seas, and municipal legislation alone, in the absence of an international concert, cannot avail to control even the most glaring cases of neglect. It has been well observed by a leading London journal (*Standard*, September 14, 1878), that "if it were not that so large a proportion of the traffic of the world is carried on in vessels amenable to English laws, the necessity of some general and severe Criminal Code of Navigation would have been long ere now recognised by all commercial powers." The same journal also justly remarks—"We cannot but feel the difficulty of creating Courts to which such cases could be referred, without risk of gross injustice on the one hand, and of such acquittals as would scandalise public feeling on the other."

It has been suggested, in an early passage of these observations, that the Admiralty Courts of each country, which exercise at present international jurisdiction in civil suits arising out of cases of collision on the high seas, might properly be empowered by an international concert to exercise criminal jurisdiction in such cases, where some neglect or default in observing the international rules of navigation has been the occasion of the collision. There are, we are aware, difficulties in the way of adopting this suggestion, as the Court of the Admiral, *eo nomine*, is in many respects an institution on the wane, and in some

countries there are no Admiralty Courts, and no traditions have been preserved of the ancient procedure of the Admiralty. But there is in most ports an international officer, whose jurisdiction, in cases of collision, is a young jurisdiction, the growth of which has been favoured by the daily increasing necessities of international commerce. It is to Consular Courts that, in our opinion, the attention of Governments may be wisely directed with a view to provide a check against the personal impunity which attaches at present to individual negligence in the navigation of steam vessels on the high seas. A scheme for the organization of such Courts must necessarily be of a special character, but it should be borne in mind that the existing Courts of Admiralty exercise in civil suits a jurisdiction which is *sui generis*, and which is of necessity exceptional to that of the Courts, which administer in each country the law of the land. We are not, we regret to say, in favour of the principle under which the British Parliament has recently extended the operation of the law of England to all foreign vessels navigating the high seas within one marine league of the coast of the United Kingdom or any other part of Her Majesty's dominions (41 & 42 Vict., c. 73). Under the rule of reciprocity, Great Britain must be prepared to concede to other nations the exercise of an analogous jurisdiction in accordance with their own law over British vessels navigating the high seas within a marine league of their respective coasts. Such a result, we venture to think, will not prove acceptable to British shipmasters, nor to British mariners, if there be any weight in the following observations, made *alio intuitu*, which we extract from the same leading London journal (*Standard*, September 14, 1878). "If then," it says, "the jurisdiction be entrusted to the Power in the vicinity of whose shores the accident occurred, for once that a foreign culprit is tried in English Courts—confessedly the most just and equitable in the world—ten Englishmen will be brought for trial before

tribunals for which, rightly or wrongly, Englishmen have little respect. We doubt whether, under such conditions, the proceedings even of French, German, or American Admiralty Courts would not be watched with considerable jealousy in this country. We are quite sure that no respect whatever would be paid to the decisions of such tribunals in any South American state, in Mexico, in China, in Turkey, in Russia ; and that even those of Italy or Spain would not be regarded as impartial. This is the difficulty, the necessary and inevitable, if not insuperable difficulty, in the way of the realization of Sir Travers Twiss's proposal, and he fails entirely to show how it is to be overcome."

It may be conceded, we think, in answer to this objection, that none other than a mixed tribunal is likely to satisfy objections of this character, but we see no insuperable difficulty in the way of constructing such mixed tribunals on the foundations of the existing consular jurisdiction. It would be necessary, in the first place, that the constitution of the tribunal should not militate against a cardinal principle of international law, that "the defendant should be convened before his own judge." The same principle is embodied as regards suits for torts in the maxim: *Actor sequitur forum Rei*. This principle will be satisfied by constituting the Consular Court of the defendant's nation the tribunal before which he must be arraigned, if he is charged with any neglect of the rules of navigation, whereby a collision has been brought about with a foreign vessel on the high seas. The Consul, however, of the nation, to which the defendant belongs, ought not to sit alone. He should have the aid of one legal and two nautical assessors, and the Consul of the nation to which the complainant's vessel belongs should be the fourth assessor. This organization differs materially from the organization of the Naval Courts, constituted under the provisions of "The Merchant Shipping Act, 1854," but those Courts were strictly Municipal Courts for the investigation of questions confined to British



interests. The precedent, however, is valuable as regards the jurisdiction confided by Parliament to the consular officer of the Queen in foreign countries. It is unnecessary to cite any authority in favour of the Consul having the assistance of a legal assessor, and with regard to nautical assessors it has been one of the special objects of the Reform effected in the procedure of English Courts of Justice to secure to the High Courts of Appeal at Westminster in nautical matters the power of calling in the aid of one or more assessors specially qualified. Thus, in the case of *The Dunkeld*, as reported in the *Times* of February 9, 1876, the question was raised for the first time before the newly constituted Court of Appeal in Admiralty matters, and the discussion is thus reported: "On the opening of the Court it clearly appeared that it turned entirely on a question of navigation, as it was contended that the collision had arisen from wrong steering on one side or the other. Lord Justice James observed that it was a question to be determined by the light of nautical skill and experience; and Lord Justice Mellish observed that, this being so, it would be fitting that this Court should have the assistance of nautical assessors, as the Court below, and as the Judicial Committee of the Privy Council had. Lord Justice Baggallay further observed that it was expressly provided by the Judicature Act, that the Court ought to have the advantage of such assistance. Counsel on both sides assented, and accordingly the case was adjourned for such purpose." No higher authority can well be cited than the above case in support of the suggestion, that the Consul should properly have the aid of nautical assessors. The suggestion, however, as to the Consul of the complainant's nation being an additional assessor of the Court, does not rest upon the same considerations of fitness, which apply to nautical assessors, namely, by reason of the issue involving questions of nautical skill and experience. It rests, however, on other con-

siderations of fitness, namely, by reason of the parties interested in the question being persons of different nationalities. Our ancestors thought it right in the time of our Plantagenet kings, that in trials for felony or misdemeanour in our Common Law Courts, where the party arraigned was a foreigner, he should be allowed to claim a jury *de medietate linguæ*, so as to ensure that some one or more of the jury should be capable of understanding the language of the witnesses produced for his defence, and for other reasons of a cognate character. Modern reforms have abolished the jury *de medietate linguæ* in England, and inquisitions before a jury have long since fallen into desuetude in the Admiralty Courts. We must also admit that the cases in the Plantagenet times are not exactly parallel. But a complaint has been publicly brought against the High Court of Admiralty of England in the present day, that under its procedure, foreign vessels have not an even chance against English vessels in cases of collision. Mr. H. H. Meier, of Bremen, a member of the German Reichstag, and the Chairman of the North German Lloyd's, took occasion at the last Conference of the Association for the Reform and Codification of the Law of Nations, to express publicly his dissatisfaction with the present practice of the High Court of Admiralty of England, on the ground that foreign mariners, when examined and cross-examined in Court by means of an interpreter, are at a great disadvantage as compared with witnesses speaking the language, in which the proceedings of the Court itself are conducted. This objection to the fairness of the tribunal may not be practically so serious as it may sound in theory, seeing that the nautical assessors by whom the High Court of Admiralty is usually assisted, are selected from an experienced body of navigators, who are not liable to be misled in their appreciation of nautical facts by the unskilfulness of an interpreter. It is not sufficient, however, that the scales of justice should be evenly balanced in an International Court as a

matter of fact, where it may be possible to place the evenness of the balance above all suspicion. On this ground we should suggest, that the Consul of the complaining party should be an assessor of the Consular Court, and as such, entitled to bring to the attention of the Court any involuntary shortcomings on its part to give due regard to the evidence produced on the part of the complainant.

We forbear to go into further details, but we venture to think that an International Court of the character above sketched out, will be more likely to prove acceptable to the civilised nations of the world than a further development of a system of Naval Courts, as instituted under the Merchant Shipping Act, 1854, and amended by the Merchant Shipping Act Amendment Act of 1855. But we must not omit to make a few observations about the necessity of a common Law. We are not disposed to think that offences on the sea can reasonably be dealt with on precisely the same principles as offences on the land. The driver of a waggon on *terra firma* has more control over his course if he meets another waggon, than the oarsman of a barge on the River Thames if he meets another barge. There is something in the navigation of vessels on the high seas, "*quod pendeat ex insidiis fortunæ*;" and if it be found expedient to institute International Courts to punish culpable negligence in not observing the International rules of navigation, our own Merchant Shipping Acts have set us an example in defining the offences of mariners on the high seas and in fixing their appropriate punishments.

But after all, the true remedy for these wholesale sacrifices of human life by the collision of ships is not to be sought for in new and enhanced penal enactments against the parties in charge of them. The bane of the present day is the excessive speed of the steam vessel; the antidote must be found in the superior safety of her construction. It has been recently ascertained, with a totally different object in view, that iron steam vessels may be without

difficulty constructed in compartments so adjusted that, although a compartment may be so sorely wounded as to fill completely with water, the buoyancy of the other compartments will be sufficient to keep the vessel afloat. It is in this direction that the attention of the Board of Trade may be properly directed, so that after a certain period no sea-going steam vessel should obtain a certificate as a sea-going passenger steam vessel unless she be divided into water-tight compartments. The various Corporations of Maritime Assurance may also co-operate in promoting the building of iron vessels with similar compartments for the conveyance of goods, by reducing the rate of assurance in the case of vessels so constructed. Of two things we may rest assured, that iron will become more and more the ordinary material for shipbuilding, and that a fast vessel will always be regarded as the most brilliant feather in the cap of the shipbuilder. The last discovery has been the application of steel (a condition of iron) to shipbuilding under circumstances, which have enabled a steam vessel to attain the speed of twenty-five knots an hour on the waters of the Thames. The circumstances however, under which such vessels shall be allowed to put forth all their speed, will deserve serious attention from the Governments which think it fitting to employ them. Meanwhile, there can be no doubt that every measure which tends to secure a more careful observance of the International rules of navigation, tends to diminish the hazard resulting from the increased speed, at which the various mail steamers traverse the ocean under heavy penalties if they do not keep their time. It is for England to set an example to other nations of securing for the passengers on board of British steamships the greatest possible degree of safety on the high seas. The risk of life in our iron steamships need not be greater than it was formerly when only wooden ships were in use, and when the pen of the Roman satirist described the condition of those who ventured on the high seas as that of men who

lived within a few fingers' breadth of death: "*digitis a morte remoti, aut quatuor aut septem, si sit latissima tæda.*" It should be the triumph of modern science to make the iron ship safer than the wooden ship. The chances are at present that an iron ship, not built in water-tight compartments, will prove to be little more than an iron coffin for her passengers, if she comes into collision with another iron vessel and receives the blow anywhere else than on her stem.

TRAVERS TWISS.

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## II.—LAW IN CYPRUS.

WE have gained a new acquisition. The press generally, and writers of the usual flow of "ad captandum" publications and articles, have rung the changes on the phrases "our new colony," "our new dependency," neither of which appears to us to be either an adequate or an accurate description of the nature of our new acquisition. It is easier indeed to say what Cyprus is not, than what Cyprus is, in its new relation to the Crown of Great Britain and Ireland. It is not a fresh gem added to the Imperial Crown, for in so far as it may be worthy of being counted a gem, it is still a gem of the Padishah's Crown. The allegiance of the Cypriots has not been transferred to us, but we have, out of our benevolent interest in alleviating the difficulties of our Ottoman brother and ally, undertaken to lighten his burden of Administrative Reform by relieving him of the labour of administering the Government and collecting the revenue of the island. We have started a newspaper, and are organising a body of native police, two palladia of the British Constitution

without which our rule would not be perfect. The new policemen, it appears, are "Turkish," whatever that phrase may mean in the hands of Our Special Correspondent in Cyprus, and they take an oath to be "faithful to the Queen of England in Cyprus." If any members of the force were to take a vacation and go to Rhodes, it is to be presumed that they might conspire against the "Queen of England in Cyprus" without breaking their Cypriot oath. What would happen if the Shadow of God upon Earth, the Commander of the Faithful, were to order these "Turkish" policemen in Cyprus to break the oath which the British High Commissioner has administered to them, on their superior allegiance to him as alike their Spiritual and Temporal Lord, is a question which those who know Turkish policemen in Turkey proper may be left to solve for themselves. Meanwhile, British traders, British merchants and bankers, and British speculators, are each and all anxious to share in the spoils of this gem of the Levantine Sea. They have hastened to the spot, regardless of possible malaria, ready with many a plan for dredging this harbour, rebuilding that mole, and reviving the long extinct commerce of the island. They have also had an eye to bringing its ancient repute for mineral wealth once more to the front. But their ardour is abated, their zealous self-devotion is cooled by the unpleasant fact which stares them in the face, that they do not know under what law they are living, and they do not know who may claim to be lord of the mineral treasures which they had proposed to unlock from the mountain fastnesses of Cyprus for the benefit of Great Britain and themselves. This is reasonably felt as a serious drawback, and it must act as a material check upon the prosperity of our new acquisition. We have little doubt that the majority of those who either went in person or sent representatives to open branch houses in Cyprus, assumed that where the British flag had been hoisted with so much of religious and political ceremony,

guarded by Goorkhas from the Himalayas, and blessed by picturesque Greek priests, there British law would hold undisputed sway. But it is not so, as the would-be commercial benefactors of Cyprus have discovered, to their no small dismay. And as they cannot have what they would, they must be content with what they can get, only they may be excused if they press for the earliest possible settlement of their present most undesirable state of suspense and blank ignorance as to what is law in Cyprus. It was doubtless an unpleasant surprise to many of them to learn that they were under Turkish law; as to what that Turkish law might have in store for them, they have, perhaps, preferred not to enquire too closely. On paper, we believe, it will be found that our would-be colonists might have fared worse. But the difficulty which we shall inevitably experience in bringing practice into the necessary conformity with theory, is strikingly exemplified by the fact, that even under the so recently hoisted and profusely blessed British ensign, the old inveterate, apparently ineradicable, Turkish rejection of Christian evidence has caused trouble in Cypriot Courts of Law. Will it be possible, with these warnings sounding in our ears, to entrust any part of the administration of the law to Mohammedan Moollahs and Cadis? Or will it not be found more expedient to constitute Courts modelled somewhat after the Egyptian plan, consisting of a British judge with native Christian assessors acquainted with the text of the Ottoman Code? For this it is, no doubt, which alone has the force of law in Cyprus, and this it is which our Commissioners and Judges will have to put in practice. The law itself appears to have obtained the general approbation of Sir Adrian Dingli, who was sent for from Malta to come and investigate the subject. It has since been reported that he was to proceed to Constantinople to lay certain suggestions before the Porte, calculated to render our enforcement of the law more beneficial to the people for whom we are to administer it. In



truth, Ottoman Law, in its modern codified shape, is an outcome of the veneer of European polish which the Turk has been unwillingly obliged to accept by way of sop to the Western Powers. It is, as far as it goes, a good thing that any such codification should have taken place, just as it is a good thing, as far as it goes, that an Ottoman Constitution should have been devised, and that an Ottoman Parliament should have sat, however limited and ineffectual its attempts at reform. For no student of the Constitutional Law and History of Western Europe would imagine for a moment, that any people, or agglomeration of peoples, long accustomed to despotic and theocratic government, could all at once develop into constitutionally governed states, with a Western respect for law and order. These things have been amongst ourselves the silent growth of centuries; it is impossible to suppose that a happy family of Levantine Greeks, Phanariots, Armenians, and Ottoman Turks, can suddenly become truth-telling, law-abiding citizens, either in Eastern Roumelia, Constantinople, Asia Minor, or Cyprus. But they will, we may well believe, have the best chance of settling down smoothly and rapidly into orderliness where the law is administered and the taxes are collected by a Government at once firm and impartial, which can be trusted to do justice between Mohammedan and Christian as well as between Mohammedans in their litigation among themselves. Such we earnestly hope will be the character of the Governments to be formed in Bulgaria and Eastern Roumelia, and such certainly must be the character of our own administration of Cyprus, if we are not to forfeit our self-respect, and deny the traditions of our past. It is obvious that in undertaking to enforce Turkish law, though we shall be sitting as Turkish judges, we could yet not be called upon to adjudicate between European litigants, or to punish European criminals, on principles repugnant to European law and Christian morals. Any such tares must be at once sifted and

laid aside, as far as Cyprus is concerned. Fortunately we are not altogether without the means of estimating the nature of the law which we are thus suddenly called upon to administer. In the last "Annuaire de Législation Etrangère," published by the Society of Comparative Legislation in Paris, whose valuable works we so often have occasion to cite, M. Vitchev Servicen, an advocate practising at Constantinople, has given the two books of the Civil Code published in the course of 1876, and the Constitution of the same year. The two Books which appeared in 1876, deal, the one with Confession (Aveu, Icrar), *i.e.*, the declaration by which a person recognises that a third party has rights as against himself; and the other with Actions. Another Book, of which a brief but interesting account is given by M. Georges Dubois, Substitut du Procureur Général près la Cour d'Appel de Paris, in one of the Bulletins of the Society (July, 1876), deals with the important contract of hiring, one likely to be of considerable practical interest to our immigrants in Cyprus. That the subject is a complicated one, may be judged from the fact that it is spread over no less than two hundred and eight articles (404 to 611) of the Civil Code, of which it forms the Second Book. It is divided into eight chapters, comprising, respectively, the general dispositions of the law, the conclusion of the contract, the price, the duration of the contract, the right of dissolution (*résolution*), the subject-matter of the contract, the rights and duties of the contracting parties after the contract, and the damages to which it may give rise.

This portion of the Ottoman Code will, to all appearance, require some slight modification for the purposes of our administration in Cyprus, inasmuch as it is drawn up on the basis of the Capitulations. It will probably be thought best that the powers and privileges thereby accorded to the Embassies, should, for Cyprus, be transferred to the British High Commissioner, or his repre-

sentative. In any case, it will be necessary to take such measures as will best obviate the confusion which, according to M. Dubois, is apt to reign paramount in cases where both parties are foreigners. These cases are tried by the Consul of the defendant's country, aided by assessors chosen from the same nationality, and the Consul invariably, we are told, applies the law of his Flag, not the *lex loci contractûs*, nor yet that of the plaintiff, if he be of a different nationality. This mode of rendering justice produces, it would seem, the most grotesquely different results. For instance, to take an example from our authority, suppose *Primus*, a Frenchman, and *Secundus*, a British subject, combine for certain Stock Exchange operations for which French law does not give an action. One sues the other for payment of monies. The result will be entirely opposite according as *Primus* or *Secundus* is plaintiff. If *Primus* sues *Secundus*, the case will be brought before the British Consul, who will apply English law, without troubling himself to enquire whether the particular operations in virtue of which the money is claimed are lawful either by French law or the law of the country in which the operations were agreed upon. In this case, *Secundus* will be sentenced to pay the claim. On the other hand, if it is *Secundus* who sues *Primus*, the case will come before the French Consul, who will at once decree the claim null and void, by Art. 1965 of the French Civil Code. It can scarcely be supposed that our merchants will desire the continuance of such a state of things in the Courts of Cyprus. Another point to which, no doubt, attention will speedily have to be given is the position of alien owners of immovables in the Ottoman Empire. By recent Treaties, foreigners are allowed to hold such property, but as regards that property they are assimilated to native-born subjects of the Porte. We are quite unable to see anything that justifies us in believing that British subjects acquiring real property in Cyprus will be in any other

position than this. The consequence in other parts of the Ottoman Empire is, that all real actions are brought before the native Courts, and that the parties have no right either to the intervention of the Embassy of their nationality, or to require the addition to the Court of competent foreign assessors. The Capitulations, in such cases, become so much waste paper, and the only law applied is Ottoman Law. It may be that in Cyprus the High Commissioner might, in the exercise of his somewhat mysterious and ill-defined powers, order such cases to be tried only before a British Civil Commissioner, sitting with native assessors. But on the other hand, His Excellency might not feel justified in doing more than securing the presence of a British Civil Commissioner as assessor to the native judges, perhaps with power to have the case referred to the High Commissioner on any doubtful point. But in any case we see no escape from the necessity of treating British subjects and other foreign immigrants in Cyprus as Ottoman subjects, *quà* rights over real property, and applying Ottoman Law, and that alone, to the decision of cases arising regarding such rights. We doubt whether this was in the bond, it may be said. Certainly, we do not suppose that the immigrants thought it was; and for their sakes, as well as for the alleviation of the otherwise sufficiently considerable difficulties of our position in Cyprus, we should be glad to think we were mistaken. The question is an eminently practical one, and cannot fail to come to the surface during the very earliest days of our occupation of the island. It appears, moreover, from the account given by the General Secretary of the Society of Comparative Legislation, in his review of this portion of M. Servicen's work, that the Foreign Embassies are not at one with the Porte on the subject of the contract of hiring. For instance, says M. Dubois, suppose the owner of the house is an alien, and his tenant does not pay his rent, to what Court is the owner to apply? If the tenant is an Ottoman subject, the native

Courts must be invoked ; but if both landlord and tenant are aliens, and of the same nationality, the question arises whether their Consular Court is not the proper tribunal. Certain Embassies, and notably the Italian, says M. Dubois, decide this question in the affirmative, holding actions for payment of rent not to be real actions, and consequently not withdrawn from the jurisdiction of the Consular Courts by the most recent conventions. These Embassies adhere to the view that the rule should be recourse to the Consular Court of the defendant's nationality, and that recourse to the Ottoman Courts should be a last resort, admissible only where it cannot be avoided. The French Embassy, it appears, considering such actions to be real actions, admits the Ottoman claim. It will be very desirable, if possible, to avoid causes of dissension between Foreign Consulates in Cyprus and our Judicature established there. What will be the relations between this Judicature and that already existing in the island, it may be difficult from the point of view of either International or Constitutional Law to decide, under the altogether singular circumstances in which we are placed. But it may be worth while to note the fact that, according to Ottoman Law, by Art. 81 of the Constitution of 1876,\* "all judges named in conformity with the special law regulating those matters, and provided with a patent of investiture (*berat*), are irremovable." It would seem to follow that His Excellency the High Commissioner would be exceeding his (at any rate theoretical) powers if he were to proceed to remove the Mohammedan judge who is stated to have recently caused difficulties by refusing to admit Christians to give evidence in his Court. It should also be noted that by Art. 86 of the same Constitution, "no pressure (*ingérence*) may be brought to bear upon the Courts."

\* Cited from the French text given by M. Vitchen Servicen in the last "Annuaire de Législation Etrangère." Published by the Society of Comparative Legislation. (Paris: Cotillon. 1877.)

Hence it would appear doubtful whether our High Commissioner has the legal right to rebuke the Mohammedan zeal or bigotry of the Judge in question. Of course, in these remarks, we are assuming that the British position in Cyprus is that of Administrators of an Ottoman Government, in accordance with the laws and constitution of the Ottoman Empire. Whether the government of the Padishah be truly that of a "sick man," whether it might not be possible to go further, and to say that it is the government, so-called, of one sick unto death, are questions beyond our province in the present endeavour to ascertain what is, or may be supposed to be, the law in Cyprus. Equally, of course, we assume that it is not as administrators of British Law, *vice* Ottoman Law laid on the shelf for ever, that we appear in Cyprus. In that case, it would be clear enough that all the varied complications and subtleties, all the moss growing on the old wall of English Law, and rendering Codification so difficult, would have full sway in our new Levantine acquisition. And then, no doubt, the tables would be somewhat severely turned upon that "Græcia mendax" which has exercised the minds of some of our newspaper correspondents. The Greek merchant or trader, presumably well versed in the quips and quirks of Ottoman Law would, it cannot be doubted, stare blankly enough at the food provided for his intellectual assimilation in the first set of the *Law Magazine and Review Digest* of all Reported Cases which enterprising Cypriot booksellers would at once see the necessity of providing. But this consummation, however much some of the recent immigrants of British nationality might desire it, does not appear to be in accordance with all that can be learned concerning our status as administrators of the Government and collectors of the Revenue in Cyprus. How we are to perform these functions, indeed, would seem to be already traced out for us by the Ottoman Constitution, and not to have required any Order

in Council, whatever may be the precise value of that mystic formula under the circumstances. By Art. 108 of the Constitution of 1876, it is laid down that "the administration of the provinces shall have for its basis the principle of decentralisation." It would seem, therefore, that neither Constantinople nor London should be the "centre" of Cypriot Administration, but that the cry of "Cyprus for the Cypriots" instead of having about it any suspicion of Levantine Fenianism, would be quite in accordance with the most orthodox Ottoman Constitutionalism. And on this principle it would certainly appear that there was constitutional ground for the cry "Crete for the Cretans," only, perhaps, those who may from time to time be the wire-pullers at the Sublime Porte, might not care to see the Constitution carried out in practice with such literal faithfulness. Indeed, the more we study the celebrated Constitution of 1876, the more we are impressed with the feeling that the framers or advisers of that Reform Bill of the Ottoman Empire were playing consciously or unconsciously with edged tools. To a certain extent, the discovery that this was the case, may have been one of the reasons of the rapidity with which the Constitution was "burked" almost before it had got into working order. That it contains within it valuable elements for the necessary work of educating the subject races of the heterogeneous Ottoman Empire in the art of self-government, cannot, we think, be denied by any impartial student of its provisions; but if history has any lessons to teach us, one of the most striking is the incongruity between Mohammedanism and Constitutional Government. Midhat Pacha's Constitution was therefore felt to be more than a Reform; it was perceived by many to be, from the old Turkish and orthodox Mohammedan point of view, a Revolution. In saying this, we do not for a moment doubt that the Statesman whose name is inseparably connected with that great, though hitherto, imperfect work, believed that this



Revolution was necessary to the salvation of the Ottoman Empire, and that it ought, at any cost, to be attempted. The mere arriving at such a conviction was itself a great stride away from the old, bad, traditions of the Turkish occupant of the Throne of Constantine the Great and Constantine Palæologus. Whether a Constitution, as such, can ever, even imperfectly, be worked successfully either in the European or Asiatic dominions remaining under the Sceptre of the Shadow of God upon Earth, is a question which the future alone can answer. That such an experiment would have the best chance of success if carried out by Christian administrators foreign to the soil, and strangers to its Palace intrigues, and its acknowledged official corruption, we are quite willing to admit. How this is to be done consistently with maintaining "the integrity of the Ottoman Empire," and under reserve of the local allegiance to the Sublime Porte, by foreigners who must be Ottoman governors, administering Ottoman law among a mixed population of Levantine Christians and Mohammedans, through officers principally British, is a riddle too dark for us to read—a problem too hard for us to solve.

But to Her Britannic Majesty's Government the Cyprus problem would appear to present no such difficulties as we experience, endeavouring, as we do, to look at it from a purely juridical point of view. We have had an "Order in Council," given at the Court at Balmoral, reciting the expediency of making "provision for the exercise of the power and jurisdiction vested by treaty in Her Majesty the Queen in and over the island of Cyprus;" and proceeding to declare that Her Majesty, "by virtue of the powers in this behalf by the Foreign Jurisdiction Acts, 1843 to 1878, or otherwise in her vested, is pleased by and with the advice of Her Privy Council, to order, and it is ordered," &c. Of the orders following this preamble, the pith seems to lie in the constitution of a Legislative



Council, which, curiously enough, is created in far fewer words than are allotted to the High Commissioner's "official seal." Of the powers in virtue of which both the "official seal" and the "Legislative Council" of Cyprus are created, we cannot but think, failing adequate information in the text of the order itself, that the pith is to be found in the somewhat vague source, "otherwise," appended to the mention of the Foreign Jurisdiction Acts. For, it being a principle of International Law that all States are equal and sovereign, no such Acts as those cited could or did pretend to give Her Britannic Majesty jurisdiction within the dominions of a foreign State, over the subjects of a foreign State, such as the Cypriots are. And Cyprus is clearly still, in the eye of International Law, a portion of the Ottoman Empire; else it would be unnecessary to invoke any "Foreign Jurisdiction Acts." But how, then, is the British Government to legislate for a portion of the dominions of a friendly sovereign? And why should fresh legislation be undertaken when there is already in existence, under the Ottoman Constitution of 1876, a special law for the administration of the Provinces? The British flag in Cyprus is the flag of the administrator; but, *ex hypothesi*, he is an Ottoman administrator. The "Order in Council" of the 14th September, 1878, constitutes in Cyprus a Legislative Council, with whose "advice" the High Commissioner is to "make all such Laws and Ordinances as may from time to time be necessary for the peace, order, and good government of the said island." But it has already been laid down by Art. 109 of the Ottoman Constitution that "a Special Law shall regulate on the broadest basis the election of the Administrative Councils of the Provinces (Vilayet), Districts (Sandjak), and Cantons (Caza), as well as of the General Council which is to assemble annually in the chief town of each Province." By Art. 110, the powers of the General Administrative Council are thus defined; they embrace, "the power of deliberating on matters of public utility,

such as the creation of means of communication, the organisation of Agricultural Credit Banks \* (Caisses de Crédit Agricole), the development of industry, commerce, and agriculture, and the spreading of public instruction." With regard to one very important factor in the condition of the populations under Ottoman rule, the Provincial General Council is unfortunately very restricted in its powers. The Article (110) from which we have already cited, goes on to enumerate among those powers, "the right to bring complaints before the competent authority in order to obtain the redress of acts done in contravention of laws and regulations, either in the assessment or gathering of taxes, or in any other matters." Hitherto, of course, this right of complaint by the Council General to the competent authorities has meant a report sent up by some daring Council to Constantinople, and the receipt of some stereotyped official formula, if anything, to the effect that the complaint forwarded by the Council had been "laid before the proper authority."

There is nothing to show whether the existing "paper" organisation of the provinces of the Ottoman Empire is to be respected and carried into effect by the British High Commissioner. If it is, we presume that he will become the "proper authority" to whom the General Council in the Province of Cyprus will in future present any complaints. Besides the General Council, however, provision is made for Cantonal and Municipal Councils, the former of which is charged with the administration of the revenues of its community arising from church lands and pious bequests (Vakouf), charitable bequests, and orphan funds. The Cantonal Councils appear from the text of the Constitution to be intended as confessional bodies, administering the

\* The necessity for such institutions has been urged by British correspondents from Cyprus, who were apparently unaware that powers had existed for them on paper, under the Ottoman Constitution, since 1876. We fear this is but a typical example of the fate of paper legislation throughout the Ottoman Empire.

revenues of their respective religions. Thus Mohammedan Councils would administer Mohammedan revenues, "Orthodox" Councils those of the "Orthodox," Jewish those of the Jews, &c. It would seem that in accordance with this provision, British Cantonal Councils ought to be created as soon as there are any British church lands, or charitable funds, the revenues of which require to be administered. On Municipal Councils very little is said in Art. 112, but the principle is distinctly laid down that "municipal affairs are to be administered, both in Constantinople and in the Provinces, by Elective Municipal Councils." The organisation and powers of these Councils, it is stated, are to be "fully determined by a special law." Whether this law has yet been passed we are not at the present moment informed.

On the assumption that it is the Law of the Ottoman Empire which the British Administrator of the Government of Cyprus will have to administer, it should be noticed that by Art. 117 of the Constitution, the interpretation of the Laws of the Empire belongs to the following authorities: "In the case of Penal Law, to the Court of Cassation; in the case of Administrative Law, to the Council of State; in the case of the provisions of the Constitution, to the Senate." It is difficult to see how the British Administrators are to escape from the necessity for carrying out this elaborately-arranged and carefully-graduated system of Appeals to the various authorities at Constantinople. If the system is carried out, we can scarcely suppose that it will be conducive either to cheap or speedy justice—two cries very much in vogue in the present day. If it is not carried out, then the High Commissioner must be either *mero motu*, or "in virtue of the Foreign Jurisdiction Acts," or "otherwise," constituted into a Final Court of Appeal in his own most excellent person, a dignity which may indeed exalt his position, but which can hardly fail to make his head lie as uneasy as though it wore a crown. It has been asked, and not without serious reason, "Who are Her

Majesty's subjects in Cyprus?" The question is a serious one, whether from the point of view of Constitutional or of International Law; and it was well worthy of being put by one who had held the exalted office of Lord High Chancellor of England. We must confess that we do not think Lord Selborne's question has yet been answered. We read in the daily press many ambiguous and even conflicting statements as to the British position in Cyprus. We are told that we "occupy it as a friendly power," though it may be questioned how far such "occupation" would be likely in most cases to cement the friendship of the "occupying" and "occupied" Powers. We are also told, and that with most patent truthfulness, that harm is being done by the "uncertain position occupied by the English Government towards the Sultan and the Porte." We can well believe that such is the case, but it is easier to state the difficulty than to suggest the solution. Who is the owner of the waste lands of Cyprus? Is it the State, and if so, what State? Is it Great Britain, or the Ottoman Porte? Has the Sultan any private property in the island, whether of ancient right, or by modern acquisition, and in either case is such property Crown land, or the Sultan's personal property? If the latter, is it subject to taxation? We have already pointed out possible difficulties regarding the allegiance of our new island police force. They are a part of the illustration of the difficulties involved in the question: "Who are Her Majesty's subjects in Cyprus?" The question of the waste lands is one of great importance as regards the development of the mineral wealth of the island, which has been so loudly vaunted. If this wealth belongs to the lord of the soil, it is all important to know *cujus est solum*. In the early days of Her Majesty's Administrator, now named High Commissioner, there was a curious piece of news wafted to English shores to the effect that, His Excellency had issued a regulation forbidding persons to land in Cyprus without a passport; and in addition, if we mistake not, a personal recommendation from two house-

holders in the island. And there was no hint given that this regulation was not to apply to British subjects. But whether or no it applied to our own countrymen, we should like to know under what "otherwise" the gallant Administrator could shelter his requirement of the production of passports and recommendations of Cypriot householders from any persons, whether British subjects or the subjects of foreign Governments, as a condition precedent for landing in Cyprus. And we should like to know whose passports they were to exhibit, and where the visas were to be obtained. We do not, of course, for a moment suppose that His Excellency, in taking what he doubtless believed to be necessary precautions to protect the island of Cyprus from an influx of presumable adventurers, imagined himself to be exceeding his extraordinary, but at that period, very vague powers. We only submit that such high-handed action, if it had any constitutional ground at all, must have rested upon an Ottoman not a British basis, since passports are not required from persons landing in any portion of the British dominions. For all we know to the contrary, indeed, this regulation may still be in force.\* But we imagine that the Legislative Council would now have, or invent, power to advise the High Commissioner whether he would be justified in continuing to exact this requirement. In our eyes it goes far to prove that the Administrator was consciously treating Cyprus as Ottoman soil. Who, then, we may well enquire, are Her Majesty's subjects in the island, and what is their status there? We believe it will be found, at any rate until some fresh Convention is concluded, or some explanatory rider is added to the existing

\* Some "authority" in Cyprus, though it is not clearly stated which, evidently still assumes to be clothed with very arbitrary powers of imprisonment. If the conduct pursued, according to the *Daily News* of 10th October, towards Sig. Cesnola, brother of the late American Consul, General Count Cesnola di Palma, be generally pursued towards persons landing there, Cyprus and its reputed wealth will be very much at a discount, and our foreign friends, whether in Italy or the United States, will receive quite a new light on our attachment to Constitutional Principles.

Convention, that Her Majesty's subjects in Cyprus are the same persons who would be Her Majesty's subjects in France, Germany, or Italy, or any other European country. That is to say, any natural-born or naturalised British subjects, travelling or commorant in the island, who are, *quà* British subjects, aliens in Cyprus, which is Ottoman soil ; subject, however, to the very important limitation that if such persons acquire landed property in Cyprus, they become for such property Ottoman subjects in the eyes of the law. And the Law of Cyprus is the Law of the Ottoman Empire. "There is no God but God, and Mohammed is the Prophet of God." "Whosoever followeth any other religion than Islam, it shall not be accepted of him, and in the next life he shall be of those who perish." Which is a comfortable doctrine provided by the Suras for the British Administrators of the Government of Cyprus.

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### III.—THE NEW CRIMINAL CODE.

*Ignorantia juris non excusat.* "Everyone is presumed to know the law." These are maxims the expediency of which must be generally conceded, for were it otherwise the administration of justice would be next to impracticable. If ignorance of the law were admitted as a ground of exculpation, it would be set up as a defence in every case, and the Courts would be called upon to decide questions which it were next to impossible to solve. A knowledge therefore, more especially, of that department of jurisprudence which deals with the nature, varieties, and degrees of crime, and assigns to it its appropriate penalty, is primarily essential to every individual in a State. But, it may fairly be asked, how far the presumption that "everyone is supposed to know the law," accords with the truth. Does there exist any plain and simple statement of the law which is readily accessible to the masses ? Is it contained in any

authoritative treatise which is within the reach and comprehension of the humble and the unlearned? Unhappily none but a discouraging answer can be given to these inquiries. The law lies embedded and concealed in a measureless heap of cases and legislative enactments; the one, deciding isolated points as they happened to arise, the other, ill-arranged and unsystematic, passed at different times, written in different styles, intended for different purposes, and finally consolidated into a small number of statutes faithfully preserving the confusion of the materials out of which they were fashioned. To find out the law relating to any given offence, one has frequently to hunt and chase it through a multitude of statutes, law reports, and unauthorised legal text-books. In consequence of its present chaotic state, the inconvenience attending its administration is immense. Owing to this cause our Judges apply rules and principles timidly. Justices of the Peace, who are not professional lawyers, prove themselves incompetent to perform the delicate process of extracting principles from decided cases. They are unable to grapple with the difficulties arising from the language, form, multitude, and dispersedness of statutory provisions, and from the obscurity of the rules by which these provisions are construed. The maze of statutes and authorities naturally leads to piece-meal legislation, and alterations are effected in the existing law without having regard to the entire legal system. If, however, the Courts and the Legislature suffer from the legal machinery being out of gear, *à fortiori* its diffuseness and intricacy must weigh with greater hardship upon the community at large. There is no disguising the fact that scarce any, save professional lawyers, have a knowledge of the criminal law, although all must of necessity be bound by it.

Various are the remedies that have been suggested to remove this standing reproach, but up to the present moment no effectual means have been adopted to wrest the



law from its hiding places. There seems to be on the whole a preponderance of opinion in favour of a Code which shall embody in abstract, adequate, and unambiguous phraseology the practical results of all the learning contained in the statutes and judicial decisions. This conception of a Code is a creature of modern civilization, for, although in ancient times every collection of laws promulgated by the Legislature was thus designated, instances of a Code in the modern acceptation of the term cannot be traced back further than the middle of the last century. Of all the ancient systems of law the sole example which may be regarded as an approach to the idea of a Code as we understand it is that of Justinian. In recent times, however, the demand for a complete and systematic re-expression of existing law has manifested itself in all the principal European countries save phlegmatic England. To comply with this requirement Prussia provided herself with a Code in 1747, Austria and France simultaneously in 1753, Russia in 1767, and subsequently even our Colonies have set us an example in this respect. Our statesmen have hitherto treated the question of Codification with stolid indifference, if not with stubborn opposition, but a change has now come o'er the spirit of their counsels, and, as if to make amends for former apathy, it has been reserved for a Conservative Attorney-General during the past Session to bring in a Bill, which, besides covering the whole field of Indictable Offences,\* imports a series

\* This measure we are informed is but a first instalment—an experiment. Hence offences punishable on summary conviction have been omitted, likewise those created as sanctions for the infringement of special provisions of certain Acts, which, in order to render them intelligible, would have necessitated the re-enactment *in extenso* of the statutes themselves, thereby increasing the bulk of the Bill to an enormous extent. For this reason, and to prevent confusion, those Acts which constitute the repetition of an offence punishable on summary conviction an indictable offence, have been excluded. With these exceptions, every indictable offence of practical importance is to be found within its pages.



of reforms which will be deemed nothing short of revolutionary.

The construction of a Code is a task of considerable magnitude. No one save a consummate lawyer is capable of reducing the bulk of the law and of simplifying its mechanism; nor will a mere acquaintance with the actual details of the system, however extensive and accurate, suffice. He who would attempt the enterprise with any chance of success must possess no ordinary powers of synthesis and analysis. He must be able to retain within his mental grasp the entire system in all its ramifications. Not only is an intimate knowledge of the law viewed as an organic whole requisite, but an aptitude for co-ordination and correlation is equally essential. He must also be endowed with discrimination and sound judgment to make a prudent selection between conflicting statutory provisions or judicial statements, and after the labour of sifting the gold from the dross has been accomplished he must bring to the undertaking a rare combination of talents in order to fuse as in a crucible, recast in a new mould, and reproduce the substance of the law in language at once concise and intelligible.

It is no mere idle form of words to say that the Government has discovered in Sir James Fitzjames Stephen an intellect possessing all these qualifications. As part projector of the Indian Code, the working of which has been attended with the most satisfactory results, and as author of a *Digest of the Criminal Law*, not to mention several other important contributions to this branch of Jurisprudence, Sir Fitzjames Stephen has proved his skill in simplifying, condensing, and amending the Criminal Law. He has laid the foundations and erected the scaffolding whereon the reconstruction of our law can safely rest, and it was in recognition of these distinguished services that the Law Officers of the Crown were induced to entrust to him the preparation of the measure presented to Parlia-

ment. That the work undertaken by this eminent jurist was a labour of love may be concluded from the following excerpt written so recently as December last.

“ Upon the subject of the codification of the criminal law I have hardly anything to add to what I have said on many occasions. I believe that it lies at the root of all real reform on the subject. Until the definitions of crimes, the punishments appointed for them, and the manner in which proceedings for their punishment are to be conducted, are placed before the public in a plain, systematic, authoritative manner, hardly any one will know what the criminal law really is, and all attempts at its improvement will of necessity be feeble and unconnected, and in many instances productive of more harm than good.”\*

The above quotation faithfully indicates the scope of the Bill, but the process by which it is to be put into operation can only be learned after a careful examination of its provisions. The space at our disposal will not admit of a detailed analysis of them here, and it is therefore merely intended to enter upon a cursory survey of those of its prominent characteristics which are calculated to arrest public attention. The Code consists of 425 sections grouped under seven headings, the first of which is preliminary and miscellaneous, and the last exclusively occupied with procedure, whilst crimes are classified in the following manner:—

1. Offences against public order, internal and external.
2. Offences by and against public officers, and against the administration of justice.
3. Acts injurious to the public generally.
4. Offences against the person, the conjugal and parental rights, and the reputation of individuals.
5. Offences against rights of property or rights arising out of contracts.

First and foremost among the changes incorporated into

\* *The Nineteenth Century*, No. 10, p. 737.

the Bill, is the suppression of two time-honoured terms, together with all the learned lore attaching thereto. Blackletter lawyers perusing its index will sigh in vain for the familiar expressions, Felonies and Misdemeanours, words which conjure up a host of memories associated with a life-long study of the law. To their discomfiture they will soon discover that these two great classes of crime have been stripped of every distinguishing feature, and that the ancient distribution of offences into Treasons, Felonies and Misdemeanours has become merged in that of "Indictable Offences." Time was when Misdemeanours were of a trivial and unimportant character in comparison with Felonies, which usually involved the penalty of death, but neither as regards their relative turpitude, nor the punishments assigned to them, has the distinction been rigorously maintained. A classification which makes theft or bigamy a Felony, whilst offences if anything more heinous, *e.g.*, perjury and conspiracy to murder are placed under the denomination of Misdemeanours, is entitled to scant veneration at the hands of those whose aim it is to render the law logical. Little regret is likely to be evinced at this alteration except by sticklers for what is antiquated, who will descry in the proposed re-arrangement a wholesale demolition of legal monuments. They will tell us that in the anxiety for uniformity, the codifier has been tempted into indiscriminate innovation which will be productive of future mischief. There is however, scarcely any probability that these dismal forebodings will be justified by events.\*

It will be fresh in the recollection of many that in the *Franconia* case the Court for Crown Cases Reserved decided by a majority of one, that an offence committed within the three-mile zone of the English coast is not subject to the

\* Sir Fitzjames Stephen has altered his mind since he published his "General View of the Criminal Law" in 1863. He then inclined to the opinion that the better plan would be to remodel the classification of felonies and misdemeanours. See page 110.

jurisdiction of the Central Criminal Court, and must therefore go unpunished by our tribunals. Section 3 of the Code reverses this ruling, and fixes the limit of extra-territorial jurisdiction in accordance with the Territorial Waters Jurisdiction Act of the past session.

Chapter II. treats of punishments, the varieties of which are enumerated and defined. Medicine we know has no panacea. Different means must be resorted to, according to the nature of disorders and the temperament of the patient. The art of medicine consists in studying all remedies, in combining them, and putting them into operation according to circumstances. So it is with punishment. Bentham points out \* that as there is no punishment which taken separately unites all the requisite qualities, it is necessary to have a choice among many punishments, to vary them, and to make several of them enter into the same infliction. Following this sound doctrine, the Code, while abolishing solitary confinement, retains the punishments of death, penal servitude, imprisonment, detention in a reformatory, police supervision, flogging, whipping, and fines. It might prove interesting to investigate this catalogue of penalties, for the purpose of estimating the extent to which they are respectively conducive to beneficial results, but so extensive an inquiry would transgress the limits assigned to this article. Closely connected with the modes of inflicting punishment, is the length of sentence attached to the commission of crimes. Jurists are agreed that there ought to be a fixed ratio between crime and punishment, and the scale should be graduated so that the more destructive to the public safety and happiness the crime, and the stronger the inducement to commit it, the more vigorously should the remedy operate. Both Beccaria and Bentham insist that if punishment of equal severity be dealt out to the perpetrators of

\* "Principles of the Penal Code," Part iii., ch. vii. See also Montesquieu's "Esprit des Lois," Book vi., ch. xvi., and Book xii., ch. iv.

two crimes of an unequal degree of turpitude, there is nothing to deter men from committing the graver, so often as the attendant advantages to be reaped are greater. If, for example, the same amount of punishment be allotted to offences against property, as to offences against the person, all difference between those crimes will shortly vanish from the minds of the criminal classes. The sole object of punishment should be to deter the culprit from doing further injury to society, and to prevent others from committing the like offence. Punishment ought to be inflicted with a view to making the strongest and most lasting impression on the imagination of others, accompanied with the least torture to the body of the criminal. In other words, the degree of punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, coupled with the least possible pain to the delinquent. That a punishment may produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the perpetration of the crime, including in the calculation the certainty of the punishment, and the deprivation of the expected advantage.\* All severity beyond this is superfluous and therefore tyrannical. Can it be truthfully asserted that our own laws conform to the principles just enunciated? Are they not too prodigal of punishment in respect to offences against property, and too lenient with offences against the person? How little regard has been paid to the scale of punishments may be judged from the fact that whereas conspiracy to murder is punishable with ten years' penal servitude, the cutting of hop binds may be visited with fourteen years' penal servitude. This is but one of the many illustrations that might be adduced to prove the inconsistency and injustice of the present law. The Code will confer an incalculable boon on this nation, and indirectly on civiliza-

\* Beccaria on "Crimes and Punishments," ch. xxvii., cf. Bentham's "Principles of the Penal Code," Part iii., ch. ii.

tion, by rendering punishment proportionate to the guilt of the offender. To rectify the inequality of punishment for theft and fraud, the Judges in passing sentence are to take cognizance of the nature of the thing stolen or obtained, the position of the person committing the offence, the place where the crime was committed, the manner of committing the offence, and the value of the property taken. "In future," to borrow a simile of the Attorney-General's, "the crime of one who opens a fictitious bank or floats a company to work a sham mine, is to be visited with a severer penalty than that of a poor hungry wretch who purloins a mutton chop." So too, a man who swears away another's life, is to receive a heavier punishment than one who gives an undeserved good character to a boy accused of petty theft. The wisdom of drawing these obvious distinctions cannot be too highly commended. In readjusting the *maximum* length of sentence upon some definite principle, and in totally abolishing cumulative sentences, most strenuous efforts have been made to bring the administration of criminal justice into harmony with the more humane spirit of the age. The law has been rightly accused of undue severity, in determining that not less than a certain amount of punishment shall follow the commission of particular offences. This system of *minimum* sentence is not unfrequently fraught with unnecessary hardship, and it has therefore been thought expedient to invest the judicial authorities with an unlimited power to mitigate punishment. Upon this matter Sir Fitzjames Stephen observes:—

"After much study of the definitions of crimes, I have arrived at the conclusion that though it is possible to form definitions which will make the law clear, consistent and short, it is impossible to frame any definition which will not cover acts involving almost every imaginable shade of moral guilt. The result of this is, that a corresponding latitude must be left in the power of inflicting punishment.

Manslaughter, to take a strong instance, may be all but murder, and may be all but accident ; and even if the offence were so defined (as probably it ought to be) as to distinguish between killing by culpable negligence, and killing by violence intended to hurt, but not to kill, still the circumstances of such negligence or violence would vary to an extent which would be represented in punishment by the difference between penal servitude for life and a fine."\* In conformity with this expression of opinion, section 12, paragraph 8 of the Code, permits a fine to be substituted for penal servitude or imprisonment. No one doubts that the judges will exercise this power with prudence, but it is a serious question whether the Legislature ought not to pause before placing in the hands of the county magistrates throughout the kingdom so unfettered a discretion.

Under the designation of "matter of excuse," Chapter III. particularises the grounds of non-imputability for acts which would otherwise be deemed criminal : such, for instance, as childhood, insanity, drunkenness, compulsion, &c. An attempt is here made to reconcile the legal with the medical definition of insanity, and a wife is no longer to be exculpated on the plea that she acted under her husband's coercion. Applying the maxim *de minimis non curat lex* to criminal trials, Section 26 enacts, that "nothing shall be deemed to be an offence which appears to the Court having cognizance of the matter to be of too little importance to be treated as such, or if the justice before whom the case is brought for inquiry is of opinion that there are circumstances in the case which render it inexpedient to inflict punishment." In cases of this description the practice at present obtains of inflicting one day's imprisonment, which at the Assizes, as they commence from the opening of the commission on the previous day, implies the immediate discharge of the prisoner. The latter part of this section is merely an extension of the statutory power

\* *The Nineteenth Century*, No. 10, p. 740.

now possessed by justices to dismiss persons charged with assault or larceny. It would seem from the language employed, that fuller powers are to be granted to the inferior than to the superior tribunal, but so needless a distinction may be obviated by slightly changing the wording of the section. What has been previously noted with regard to the magistrate's power of substituting a fine, may, with equal propriety, be observed of this provision, and the public will assuredly look with misgivings upon any extension of discretionary power entrusted to untrained justices of the peace.

Those will be doomed to disappointment who had hoped to find in Chapter IV., under the heading "parties to the commission of an offence," an explanation of the terms principals of the first degree, principals of the second degree, and accessories before the fact. Such subtleties are omitted from the Code in order that he who plans and he who executes the offence may be placed in the same category. The lawyers have assigned two curious reasons for refusing to recognise accessories before the fact in crimes other than felonies. Treason, it is said, is so infamous an offence, that all persons connected with the commission of it must be regarded as principals, whereas misdemeanours on the other hand are of so trivial a nature that no such distinction can be entertained. It might have been foreseen that the hand which had the courage to brush away the useless cobwebs enveloping felonies and misdemeanours would not scruple to dis-embarrass the Code of any unserviceable minutiae connected therewith. One of the beneficial consequences that will result from the above alteration is an avoidance of prolixity in criminal pleading; but in spite of the Code, there must necessarily rest in the popular mind a well-marked distinction between the authors and the perpetrators of a criminal conspiracy. A difference exists between the principal offence, namely, that which effects the evil in question,



and the accessory offence which lends greater or less impetus to the principal offence. The confederate who incites might have relented before committing the crime or he might have lacked the courage to carry out his fell purpose, and, by a parity of reasoning, the hand that accomplishes his project might never have been implicated but for his instigation. It is, however, rarely possible to estimate the exact share of guilt resting on the shoulders of each individual, and the Code therefore brands with equal ignominy every participator in an indictable offence, leaving it for the judge or magistrate before whom the case is tried to apportion the punishment. Section 30 of this chapter provides in accordance with the dictates of humanity that "a husband or wife who receives, comforts, or relieves his or her wife or husband, knowing her or him to have committed an indictable offence, shall not become thereby an accessory after the fact to such indictable offence." This indulgence is at present confined to the wife,\* and it needs no feat of advocacy to convince one that the privilege should in justice be extended to the husband. Some surprise may naturally be felt that in the endeavour to remove all seeming incongruities, the expression "accessory *after* the fact" should have been retained. Taken in its ordinary signification, accessory means a person who aided in the given crime and who therefore must have been a party to it *prior* to its completion.

Part II. comprises offences against public order, internal and external. Here are collected (a) High Treason and other offences against the Queen's authority and person; (b) unlawful assemblies, riots, breaches of the peace; (c) unlawful oaths, seditious words, conspiracies and libels; (d) offences relating to foreign countries; (e) offences against the person on the high seas. To enter upon a comparison of existing legislation with the modifications proposed in

\* Hale's "Pleas of the Crown," p. 621.

this portion of the Code would not, it is surmised, warrant any detailed comment. A consideration of them may therefore be dismissed with a mere mention that the new definition of treason excludes among other fictions, the slaying of the Lord Chancellor or a Judge on the Bench, and that with regard to accessories after the fact to treason, and in cases of piracy, the death penalty is commuted to penal servitude for life as a maximum punishment.

Part III., entitled, "Offences by and against public officers and against the administration of justice," is chiefly a recapitulation in a condensed form of the law, as it at present stands. It should, however, be noticed that the offence of perjury has been expunged, and in its stead the definitions of false evidence and false declarations have been framed so as to bring within the meshes of the Criminal Law, acts, which though equally injurious to society as perjury itself, have hitherto escaped the vigilance of the Legislature. Furthermore, Section 84 is designed to deter persons from making claims similar to those of the "unhappy nobleman now languishing in Dartmoor." Whenever rewards are offered for the recovery of the proceeds of extensive robberies, an outcry is raised that a felony is about to be compounded. Common prudence suggests that such bargains should be prohibited, but instances do occur where compensation to the injured party, is the most satisfactory course that can be adopted. To meet the latter class of cases, Section 96 enables persons to make an agreement not to prosecute, on condition that the compact be authorized by a Court or a Judge of the High Court of Justice. The public will learn with feelings of calm indifference that the Code seeks to erase from the catalogue of crimes the effete offences of maintenance, champerty, and common barratry. Some unlearned readers may possibly be desirous of informing themselves as to the nature of these misdeeds. For their special behoof then, be it stated that maintenance is an officious intermeddling in a cause

depending between others, by assisting either party with money or means to prosecute or defend it; champerty is maintenance with the addition of an agreement to divide the thing in the suit, and common barratry is the practice of exciting law suits and quarrels.

Part IV. is devoted to "Acts injurious to the public generally." Under this denomination come offences against religion and morality, and common nuisances. Here, as might have been anticipated, the codifier declines to perpetuate a host of penal statutes symbolic of the bigotry of a bygone age. Happily we live in times when the State no longer compels compliance with the tenets of the Church.\* Prosecutions for heresy and schism, would if instituted in our days, inspire a revulsion of feeling throughout the entire country. The Code imposes no restriction upon the dissemination of spiritual and moral dogmas so long as the teaching does not overstep the bounds of decency, and whilst seeking to repress every species of public impropriety, whether in speech or conduct, it secures to everyone the most complete liberty of conscience. One cannot help expressing a regret that when obliterating many vestiges of former intolerance, the opportunity was not seized to amend a law which keeps alive the puritanic sentiment still prevalent in this country. The Sunday Closing Acts are a flail placed in the hands of the Sabbatarians wherewith to scourge those who dare to differ from them as to the way in which the day of rest should be spent. A repeal of the 21 George III., chapter 49, might provoke a discussion which would retard the progress of the Bill through Parliament, but that excuse will not justify a refusal to abrogate an arbitrary and illiberal law.

The popular and legal senses of the word "malice" are so widely divergent that Judges can rarely get juries to master the distinction. Legally, malice implies "wilful

\* See Montesquieu's condemnation of the practice of enforcing religious observances in his "Esprit des Lois," Book xxv., ch. xii.

illegality of conduct," but the meaning popularly attributed to it is "malevolence of an immoral kind towards a particular individual." To avoid misunderstandings the Code substitutes the legal explanation of the word itself in the definitions of murder, libel, arson, and malicious mischief.

Part V. consists of offences against the person, the conjugal rights, and the reputation of individuals. The Code completely revises the law of homicide, annuls constructive murder, and establishes the doctrine of provocation upon a more reasonable basis. According to the present law, a person who causes the death of another by any act done in the commission of a felony, or in resistance to lawful apprehension, is guilty of murder, however unlikely it may have been that the act would cause death. By Section 134, murder is restricted to cases in which death is occasioned either intentionally or by acts of reckless cruelty or lawlessness. "The laws against the crime of infanticide, under pretence of humanity, are a most manifest violation of it. Compare the offence with the punishment. The offence is what is improperly called the death of an infant, who has ceased to be, before knowing what existence is—a result of a nature not to give the slightest inquietude to the most timid imagination; and which can cause no regrets but to the very person who, through a sentiment of shame and pity, has refused to prolong a life begun under the auspices of misery. And what is the punishment? The barbarous infliction of an ignominious death upon the unhappy mother, whose very offence proves her excessive sensibility; upon a woman guided by despair, who, in hardening her heart against the softest instinct of nature, has harmed none but herself! She is devoted to infamy because she has dreaded shame too much." Thus earnestly did Bentham plead the cause of the ill-used sufferer, and in a no less pathetic strain wrote Beccaria, and that philosopher whom the great French poet of this century has been pleased at one time to crucify, and at another to

deify—Voltaire! By Section 138, the Code reduces the crime of infanticide from murder to manslaughter, if the mother at the time when she committed the act was deprived by bodily and mental suffering, of the power of self-control. The leniency which marks these innovations springs from a desire to render punishment more certain, by tempering its severity. Those who have experience in our Criminal Courts, cannot have failed to observe the reluctance with which juries stigmatise as a capital offence, an act which is so merely in the eye of the law. Every assize bears testimony to the fact, that juries persistently refuse to convict of murder upon purely technical grounds. In vain do prosecuting counsel beseech and judges exhort them to dismiss from their minds all contemplation of the consequences of their decision; in vain do they enjoin them to leave out of consideration the circumstance that upon their verdict hangs the life of a human being. Juries are at times called upon to determine whether they will violate their oaths or condemn to the gallows the victim of a barbarous law, and, guided on such occasions by their instincts if not by their intellects, they do not hesitate to adopt the former alternative. The deduction to be drawn from their verdicts has not been thrown away, and in future they will be relieved from the painful dilemma in which the law now places them.

Whilst holding out the hand of mercy to the woman who destroys her new-born offspring, the protection of infant life demands that those who wilfully cause the death of a living child in whose system an independent circulation has not been completely set up shall bring themselves within the pale of the criminal law. By reason of this *casus omissus* malefactors have not unfrequently escaped, but Section 168 of the Code will effectually supply the deficiency.

The next improvement which the Code will accomplish is contained in Part VI., wherein offences against the rights of property or rights arising out of contracts are successfully

treated. The six Consolidation Acts of 1861, together with the common law definitions of crime assumed or embedded in them, are full of needless intricacy and hardly intelligible technicality. In inconsistency and obscurity, however, the Larceny Act by far surpasses its five companions. The classes of things that are or are not capable of being the subject of larceny, and the circumstances which must combine to constitute the offence, so complicate this branch of the law as to render it utterly incomprehensible to the uninitiated. Nothing could well be more irrational than the methods by which its principles have been maintained, nothing more arbitrary than the expansion of its definitions. This deplorable state of things the Code will ameliorate, and, by means of careful generalisation, compress within modest proportions the mass of incongruous matter. There is no principle more deeply rooted in English Law than this, that no person shall be compellable to answer any question which might tend to criminate him. This inflexible rule is, nevertheless, to some extent, relaxed by Section 213, which provides that "no one shall be entitled to refuse to answer any claim in the nature of a bill of discovery, or any question in a civil proceeding, or in bankruptcy, upon the ground that his doing so would tend to show that he had committed an offence of a fraudulent nature." The only other alterations in this part which call for remark are Chapters XXX. and XXXII. By the former, prosecutions for burglary and all distinction between that offence and housebreaking are done away with; by the latter, the law of forgery has been recast and greatly simplified.

We have now arrived at that important division of the Code which prescribes the mode in which persons who have transgressed the law may be brought to justice. "In Turkey," says Montesquieu, "where little regard is shown to honour, life, or estate of the subject, all causes are speedily decided. The method of determining them is a matter of indifference, provided they are determined. The

bashaw, after a quick hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in those countries where the life of the meanest subject is most precious no man is stripped of his honour or property till after a long inquiry, and no man is bereft of life till his very country has attacked him, an attack that is never made without leaving him all possible means of making his defence." Now that the English are about to reorganise the Government of Turkey in Asia, there seems a prospect that the reproach levelled at her by Montesquieu may be removed, and if we would render his second statement thoroughly applicable to this country we must also embark upon extensive reforms at home as well as abroad.

The first Section of Part VII. empowers the judges to make subsidiary rules as to procedure. Section 234 provides that no civil remedy shall be suspended by the fact that the act complained of amounts to a criminal offence. Consequent upon the abolition of every distinction between felonies and misdemeanours, Section 286 enacts that one form of procedure shall be adopted in all proceedings against persons accused of indictable offences. The present regulations as to arrest, bail, challenge of jurors, and the separation of the jury before giving a verdict, differ in many essential particulars in felonies and misdemeanours, but a *resumé* of the means by which the Code rids itself of these anomalies would trespass too largely on the space at our disposal. Section 290 abolishes the law of venue, through the defects of which many prosecutions have proved abortive. Chapter XL. contains the necessary provisions as to the local jurisdiction of Criminal Courts, and empowers the High Court to change the place and mode of trial (Section 304). There is a manifest advantage in enabling the Court to direct that proceedings shall in suitable cases be conducted after the model of civil proceedings, for though, in a sense, nuisances, assaults, libels, and the like are public wrongs, they are

viewed rather in the light of infringements of private civil rights, and by assimilating the procedure in such cases to that of civil trials, the accused will be permitted to give evidence on his own behalf. This Section abolishes writs of certiorari for transferring criminal cases into the Court of Queen's Bench. Power is given by Section 335 to any Judge of the High Court to order evidence to be taken by commission in criminal proceedings. Ample provision is made that in all cases timely notice of the nature of the charge, and the evidence by which it is intended to be supported, shall be given to the defendant (Sections 348—352, 359, 371). Section 357 abolishes all proceedings to outlawry, and renders absconding from justice an act of bankruptcy. Section 372 empowers the Court to direct the attendance of witnesses not called by either side, and by Section 380 the time-honoured jury of matrons is replaced by that of three qualified medical practitioners. Section 383 enables the Court to dispense with the presence of the defendant if he misbehaves himself. At present, unless a jury have agreed upon their verdict by twelve o'clock on Saturday night, they must be discharged, but by Section 385 a verdict may be received on Sunday, and all such proceedings as are subsequent thereto, may be taken on that day. Section 415 permits costs to be given in all cases whatever. By virtue of 33 & 34 Vict., chapter 23, section 4, a Court can order compensation not exceeding £100 to any person whose property has been injured by any felony, but section 423 extends this power to *all* injuries inflicted either upon the person or property through any indictable offence—a course suggested by no less an authority than Jeremy Bentham.

One of the changes which is sure to be warmly debated is that of interrogating the prisoner. As the law at present obtains, a prisoner is permitted to make a statement during the preliminary investigation before the magistrate, but he



is cautioned that if he does so, his words will be committed to writing, and may be given in evidence at the trial. At the trial itself he is called upon to plead. He is also allowed to make a statement (which is *not* evidence) if unrepresented by counsel, and it has been held that he may do so even when defended.\* At no stage of the proceedings can he be examined as a witness either for the prosecution or for the defence.† Section 368 of the Code provides that at the close of the case for the prosecution he may make a statement or be examined by his own counsel, subject to cross-questioning by the counsel for the Crown, but no questions may be directed to matters affecting the defendant's credit or character. After the cross-examination is concluded the defendant may be re-examined, or make any explanation he chooses. He cannot, however, be sworn as a witness, nor is he to be liable to any punishment for making false statements. It cannot be said that the practice of interrogating a prisoner is without precedent in our jurisprudence, seeing that it existed throughout the reigns of Elizabeth, James I., and Charles I., and continued during the Eighteenth Century, when it was finally abandoned without any express abolition, legislative or judicial. Sir Fitzjames Stephen justifies the revival of this system on the ground that the purpose of a criminal trial is the elicitation of the truth, and as the facts must necessarily be within the cognizance of the accused, the most effectual method of ascertaining them is by questioning him.‡ By this means, we are told, the guilty

\* *R. v. Manzano*, 2 F. & F., 64; *R. v. Malings*, 8 C. & P., 242; *R. v. Collins*, 5 C. & P., 305.

† The Conspiracy and Protection of Property Act (38 & 39 Vict., ch. 86, sec. 11), and the Merchant Shipping Act (38 & 39 Vict., ch. 83, sec. 4), are exceptions to the rule. The first instance in modern times of a prisoner being examined, occurred under the latter Statute, at the Liverpool Spring Assizes, 1876, when the innovation was deprecated by Mr. (now Lord) Justice Brett. See Harris's "Principles of the Criminal Law," page 387.

‡ "General View of the Criminal Law," ch. vi., Part iii.

will be convicted out of their own mouths, the innocent will be informed of those suspicious circumstances which require explanation, and sham defences—namely, defences concocted out of the defects in the case for the prosecution—will become an impossibility. It must be conceded that illiterate persons experience the utmost difficulty in shaping their defence in the form of a narrative. Few of them are capable of giving an account of the simplest occurrence without either irrelevant details or omissions occasioned by the assumption that what they know is equally well known to others; and bearing in mind the anxiety under which those charged with an offence must naturally labour, it is not surprising that in the hurry, confusion, and nervousness of the moment they should be oblivious of important facts which would tell in their favour. A few questions, however, might not unfrequently place matters upon a proper footing. There are, nevertheless, difficulties in the way of introducing this change which members of the legal profession will not be slow to make manifest. Mr. Wills, for one, denies that innocent persons will benefit by an alteration in the Law; on the contrary, he considers that the effect of examination and cross-examination will be to bring into high relief the prisoner's bad qualities. A forensic acquaintance with the lower orders teaches him that the ignorant and immoral have a propensity to prevaricate, and he consequently thinks that their answers will operate unfavourably with juries.\* But if the interrogation of prisoners be conceded, there still remain important details which, prior to their final settlement, demand earnest reflection. What limits are to be imposed upon the right to interrogate a prisoner? By whom, Mr. Wills pertinently asks, is the cross-examination to be undertaken, when there is no counsel for the prosecution? Assuredly neither

\*"Ought prisoners to be examined?" by Alfred Wills, Q.C.; *Nineteenth Century* for January, 1878, p. 169.

by the Judges nor by the Chairmen of Quarter Sessions, for that would divest them of the impartiality which they are called upon to exercise. Those who view with misgivings any extension of judicial authority, will hardly rest content with the clause which permits cross-examination in the above instance to be conducted "as the Court shall direct." Moreover, re-examination, Mr. Wills insists, is a serious ingredient in a trial, and requires great care and judgment. It is a process that no unskilled person could possibly perform for himself, and, according to the writer's showing, it would be dangerous to entrust the discharge of this function to our untrained, or imperfectly trained, magistracy.

There are some other practical objections to the application of the new rule, to which attention will be invited. For example, it is expressly forbidden to administer an oath to the prisoner,\* and he is not to be punished for his false statements. No principle is laid down as to what weight the jury are to attach to his statements, nor as to the answers given in cross-examination or re-examination thereon. Now, if juries are to be directed to accept his statements and answers as evidence, the prisoner's word will hold good against the oath of the sworn witness, who can be indicted for giving false testimony. Apart from its inconsistency, such a provision will place the injured party at so considerable a disadvantage that he may not unseldom be deterred from coming forward to prosecute. If, on the other hand, juries are to be told that what the prisoner says is *not* evidence, the interrogation of him may well be deemed a waste of public time. In more than one particular will

\* To allow a prisoner to give evidence on oath would, in the opinion of Sir Fitzjames Stephen, be placing in his way too great a temptation. "Such a restriction," says the learned author, "is no argument against the interrogation of the prisoner; for in the one case the man is tempted to invent a lie—in the other case he is probed for the purpose of discovering the truth."—*General View of the Criminal Law*, p. 202. It is not easy to follow this train of reasoning.

this section of the Criminal Code Bill prove unsatisfactory, even to those who are in favour of the principle it embodies. Some will desire to be informed of the reason for deferring the prisoner's examination until the trial. Granting that the process may facilitate the acquittal of the innocent, why, it will be asked, should the accused await his trial in gaol, or, if on bail, still, in either case, with a groundless imputation resting on him, when a few apt questions at the preliminary hearing might establish his innocence to the presiding magistrate. But, perhaps, the most salient defect in Section 368 is that which, whilst providing for the examination, cross-examination, and re-examination of prisoners, leaves unrepealed the rule which entirely excludes the testimony of their husbands or wives.\*

The institution of a Court of Criminal Appeal is another of the innovations which are likely to be eagerly canvassed. The incidents of civil and criminal proceedings are dissimilar in several respects, but in none do they more widely differ than as regards the rules which govern the right to appeal. When a civil action is brought to recover, say £25, or when a right of way or an eavesdrop is in dispute, either party has a constitutional right to appeal, first to a Divisional Court, next to the Court of Appeal, and finally to the House of Lords, whereas in criminal cases, when the life, liberty, and reputation of an individual are at stake, no appeal is possible except for an informality apparent on

\* It is said that in high treason, husband and wife may be witnesses against each other, but no instance can be given. (Harris's "Principles of the Criminal Law," pp. 388, 389.) In cases of personal injury (*e.g.*, assault) by husband to wife, and *vice versa*, the parties may give evidence against each other. In prosecutions under the Conspiracy and Protection of Property Act (38 & 39 Vict. c. 86, s. 11) husbands and wives are competent witnesses. Upon an indictment for bigamy the second wife is a competent witness, 1 *Hale*, 393; so upon an indictment for forcible abduction and marriage, the woman is a competent witness against the defendant, *Bull, N.P.* 286, *R. v. Wakefield, Lancaster Assizes*, 1827. These last, however, are not really exceptions to the rule above-mentioned, for here the woman is not *de jure* the wife of the defendant.

the record, or upon a point of law reserved under the Statute, 11 and 12 Vict., c. 78. When, however, it can be shown to the satisfaction of the Queen's Bench Division of the High Court of Justice that difficult questions of law will arise, or that there are unusual circumstances which render it essential that the trial should be heard by a special jury, a writ of *certiorari* issues to remove the case into the Queen's Bench Division. In that event either party has a right of appeal to the Divisional Court upon the merits, as well as upon any points of law; but that Court is empowered to grant new trials in misdemeanours only, and its decision is final. If we pause for a moment to inquire as to the class of persons in whose judgment the law reposes such implicit confidence that it cannot, save in the above instance, be impugned, we shall find that though in practice there are two sets of jurors—special and common—with certain limited exceptions, special jurors are never summoned to serve on criminal trials at all. “It therefore happens that in the most trumpery of civil disputes, either party by giving the proper notice may pick out from the jury twelve men of first class intellect and position to try his case, yet, if the highest person in the land is to be tried for his life, he has no such liberty.”\* His fate will, in all probability, be decided by a jury composed of farmers and shopkeepers who are naturally devoid of legal knowledge and experience, and who have never given an hour's sustained consideration to any subject unconnected with their daily vocation. Hence it follows, that through their incapacity to grapple with intricate details, and their inability to comprehend the bearings of the evidence, flagrant acts of injustice are from time to time committed.

\* *Vide* Lord Coleridge's speech in charging the Grand Jury at the last Chester Assizes. Both the Lord Chief Justice of the Common Pleas and Lord Justice Bramwell are endeavouring to compel Under-Sheriffs to place the special and common jurors on one list, and to summon special jurors to serve on criminal trials.

Happily, when such events occur, they are not allowed to pass unnoticed. The nation zealously watches the proceedings in our Criminal Courts, and whenever justice miscarries, public opinion is not tardy in making itself heard, and the clemency of the Crown is invoked by popular clamour. Now it is in the highest degree impolitic that the public should have occasion to intermeddle with the administration of justice, for it must obviously derogate from the respect which is due to the law if people are permitted to suppose that they can alter its course. The prerogative of pardon, too, should be exercised most sparingly, because it is a tacit disapprobation of the previous proceedings, or an acknowledgement that the punishment is out of all proportion to the gravity of the offence. "Clemency," says Beccaria,\* "is a virtue which belongs to the legislator but not to the administrator; a virtue which ought to shine in the code but not in private judgment. To show mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression." If, however, the present practice of calling upon the Crown to over-rule the erroneous verdict of a jury is unsatisfactory, the method of adjudicating upon such matters is open to even graver objection. When such cases arise, the duty of investigating them and of advising the Sovereign, devolves upon the Home Secretary, but he is not responsible for his counsels, neither has he any special acquaintance with the law nor yet judicial experience. There is no open court, no examination of witnesses, no pleading of counsel, and the minister consummates an irregular procedure by recommending the interposition of royal mercy, only if—as in the Penge case—there are strong grounds for

\* "Crimes and Punishments," ch. xlv. ; see also, Bentham "Penal Code," Part iii., ch. x.

believing that the convict is innocent. To ameliorate the existing state of things, Chapter XLVII. of the Code introduces a system of appeals and new trials by which the judge who tries the case can grant either a new trial or leave to move for one in the Court of Criminal Appeal, the decision of which is final unless permission is obtained to go to the House of Lords. Where a conviction has taken place at Quarter Sessions, two justices, the recorder or deputy-recorder, may order a new trial to be had at the next Sessions. A Secretary of State also may, on the petition of the person convicted, grant leave to move the Court of Criminal Appeal for a new trial. If a second conviction takes place inconsistent with the first, or if the witnesses at the first trial are afterwards convicted of having given false evidence thereat, the defendant may move for a new trial. Sentences are not to be suspended pending the appeal unless they are death, flogging or whipping, or unless the defendant is admitted to bail, or unless the Court from which the appeal is made, or the High Court of Justice or any judge thereof, orders that he be treated as an unconvicted prisoner till the appeal is decided. Appeals upon points of law reserved, and upon irregularities at the trial, are to be heard by the Court of Criminal Appeal and, upon special leave being granted, by the House of Lords. Proceedings in error—almost a sealed book even to lawyers—are to be discontinued. The right of appeal is however purely one-sided, for though it is conferred on the prisoner it is denied to the Crown. To be strictly logical in this instance would shock the sentiment which dictated the maxim *non bis in idem* and on which the plea of *autrefois acquit* is founded. When a man has once been through a criminal prosecution with all the suspense and distress of mind which it entails, it is thought that he has had enough of it and ought not to be put in jeopardy again. Englishmen are prepared to sacrifice consistency at the shrine of mercy.

Chapter XLVIII. is devoted to the remodelling of criminal pleading, than which no amendment introduced by the Code is more urgently required. The pitfalls and quicksands, which can only be avoided by excessive astuteness and caution, render the framing of indictments for offences a little out of the beaten track, a task of the greatest difficulty. We have it on the authority of the Attorney-General that those drawn by the most experienced and reliable lawyers run to a length and assume a complication completely monstrous. The experience of the recent Albert Insurance frauds demonstrates the need of reform in criminal practice. The indictment in that case consisted of about one hundred counts; it covered five-and-twenty yards of parchment, and a copy cost £10. This particularity is at present necessary to prevent the escape of the guilty, but there is no reason why it should remain so, and to the accused the elaborate structure so curiously and learnedly put together must be utterly bewildering. The simple plan of formulating in tabular statements and schedules the real practical issues on which the prisoner is to be tried, is to supersede a system which in its technicality and cumbrousness is not only ridiculous but mischievous and attended with injustice. The Code concludes by repealing wholly or in part no less than eighty-five acts of Parliament.

The Criminal Code (Indictable Offences) Bill is undoubtedly the most important measure of legal reform that has been submitted to Parliament during the present reign. Its provisions will affect the jurisdictions and functions of every Criminal Court in England, and its operation may possibly be extended to all other parts of Her Majesty's dominions. So vast a measure which, besides presenting new definitions of grave significance, involves enlarged application of legal principles as well as extensive changes in procedure, is not only deserving of mature consideration in its every part but demands the closest



scrutiny. Sir Fitzjames Stephen is himself of opinion \* that "the Code ought not to be seriously discussed in Parliament until it has been laid before the public for a considerable time. No mere parliamentary discussion would be sufficient to render the work as good as it ought to be. Nothing short of a prolonged public and especially a prolonged professional criticism could detect the objections which might be made to it, and suggest the various improvements of which it is susceptible." It was at one time feared that an attempt would be made to hurry the Code through Parliament during the past Session, and that the public would be required to accept it in its entirety upon simple trust in the learning, accuracy, and sound judgment of its author. Happily, however, these apprehensions were dispelled by the withdrawal of the Bill and the appointment of a Royal Commission, consisting of Lord Blackburn, Mr. Justice Lush, Mr. Justice Barry, of the High Court of Justice in Ireland, and its originator, Sir. J. F. Stephen, who, during the months of November, December, January and February, will devote to it all the time that may be necessary for the exhaustive examination of the measure. By this means Parliament and the public will be enabled to place the fullest reliance on the criticism passed upon its every detail—and a hope may be confidently entertained that the Criminal Law thus translated, abbreviated, revised, and amended, will assume the position of a permanent national edifice.

B. L. MOSELY.

\* "Digest of the Criminal Law," Introduction, page xxv.

## IV.—EX POST FACTO LAWS.

LORD MACAULAY, in his account of Sir John Fenwick's treason, and of the Bill of Attainder introduced against him into Parliament, denies that an enactment can be called with propriety an *Ex Post Facto* Law if it change not the substantive Law, but merely the Law of procedure.\* This is somewhat a thin and subtle distinction. The division between substantive Law and Law of procedure is not very clearly defined. In our system of law, the Law of Evidence grew up in comparatively modern times, and was in its state of greatest rigour at the time when Mr. Phillips published his first edition of the Law of Evidence. In the first part of the first edition of Mr. Starkie's Law of Evidence, that learned writer defended almost every Rule that excluded testimony now universally received in our Courts. With us, therefore, the Laws of Evidence may safely be described as always part of the Law of procedure, for they had plainly a judicial origin, and were strictly laws of the Forum. Lord Macaulay, however, was dealing with a portion of the Statute Law which had a popular and a special origin. Our Law of procedure, relating to evidence in our Common Law Courts, had not declared one witness to be insufficient to prove disputed facts. The subjects had been cruelly oppressed by the regal power acting through its Courts as the ministers of its tyranny. They grew to look on the Government as an enemy, from whose violence they were to be defended. Hence the strict and special provisions as to procedure of the Statute Laws of Treason, varying, in favour of the accused, from the general provisions as to the same matter of the Criminal Law in like cases.

These exceptive provisions then—statutory in enactment,

\* Macaulay, Hist. of England, Works, Vol. IV. (1866.)

and popular in origin, dear to the people from jealous instincts—stand on a very different footing from mere laws regulating forensic procedure.

An innocent man might have had no other safeguard than the law which required two witnesses to prove the facts against him which, if true, established his treason. Let us go back, in imagination, to the Popish plot and Titus Oates. Let us suppose, in the first fury of the fear and rage of a Protestant people, suspecting with reason a plot, but not able to discover its real authors and nature, a jury no safeguard to an innocent man of the Catholic faith. In such a case his sole safety might be that Titus Oates had got no one to back his lie. If then, in such a case, the Parliament struck him down by a Bill of Attainder, or made a law dispensing with two witnesses in that special instance, leaving the general law unaltered, in either case alike, if convicted, innocence would perish by an *Ex Post Facto* Law, and whether it fell by votes of Houses, or by verdict of a jury, would be equal tyranny. The flagrant wrong and injustice would be the same.

It is obvious then, that the Constitutional safeguards of the subject in bad times equally require that law should in general be prospective, whether the meditated changes regard substantive Law or regard procedure, and whatever be the tribunal to which the new jurisdiction and power are to be confided.

This salutary rule of interpretation, for it resolves itself pretty much into a rule of construction to ascertain the meaning of the Legislature, applies equally to Civil as to Criminal Law. The reason is the same in either case, though the consequences of incautious or unjust legislation are not equally hurtful. A change in the Laws of Evidence, retrospective either designedly or by incautious and unguarded use of wrong terms, may destroy titles which any just Law-maker would especially desire to protect. In a commercial country especially, the title of a *bonâ fide*

purchaser for value without notice, is generally regarded as worthy of the protection equally of Legislatures and of Courts. Our Courts of Equity protected such titles from the risk of discovery.

We have known in modern times in England and in Scotland decisions on the Law of Marriage, establishing illegitimacy, where the parties declared illegitimate had previously supposed themselves lawful issue. The fact of illegitimacy may be quite unknown to the child though adult, and to one of the parents, nay, even to both. Let us suppose that a perfectly innocent purchaser buys an estate from an heir *de facto*, supposing himself *de jure* heir, who has succeeded to the estate of his father who supposed that child his lawful heir. After the purchase, and when no covenants for title are of any value, the blot on the title is first discovered in some way which leaves no doubt of the fact, but by documents inadmissible in evidence. The safety of the innocent purchaser is then entirely founded on the Law of Evidence. A Law consciously directed to destroy his only safeguard and his title, is, as to him, an *Ex Post Facto* Law, though it might be, in the ordinary course of business, a beneficial alteration. But if that Law left the general Law unaltered, and struck at him alone, it would indisputably be retrospective and unjust legislation, against the general policy and equity of the Laws of a Commercial State. In most, though not in all our Laws relating to Real Property which were passed many years ago, such changes, though deemed beneficial, were restricted to future wills, future deaths, future alienations, and so on, for fear of disturbing existing titles. This cautious and just principle has recommended itself to Legislators and Judges throughout our Laws, whether criminal or civil. It has had engrafted on it no such technical distinction as the historian asserts.

In the particular case of Sir John Fenwick, who had kept a witness out of the way by corruption, little feeling for the

victim would be excited in the heart of any reader. These cases, however, make bad Constitutional precedents, as hard cases make bad law, and Macaulay rightly condemns the proceedings against Fenwick. His conclusions are sound, his exceptions occasionally sophistical, as in this instance; for it must be observed that the Law as to two witnesses in treason was left unaltered, and Macaulay's instance of an alteration in the Law of Evidence made retrospective, viz., in the admissibility of the evidence of Quakers unsworn is inapplicable to the case before him. That was a general Law, applicable alike to all cases, founded on a general sense of the injustice and inconvenience of the Law. In Sir John Fenwick's case, the Law was left unaltered; but in one special case it was suspended to strike down one special offender.

LAURENCE PEEL.

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#### V.—THE LATE RIGHT HON. MR. JUSTICE KEOGH.

THE death of Mr. Justice Keogh is not only remarkable as depriving the Irish Judicature of a very conspicuous figure; the legal profession has lost in the late judge one of the most active and vigorous intellects which adorned it. The career of Mr. Justice Keogh spans the period between the O'Connell agitation and modern Ireland, an interval of much gloom and misery. Born in Dublin, in 1817, he was educated in that city, proceeding from the schools there to the University. In his course at Trinity College he obtained honours at the examinations, but was specially distinguished by the part he took in the debates of the College Historical Society, the debating society which at the University of Dublin corresponds to the Union

at Oxford and Cambridge. In 1847, at an age later than is generally chosen for entering on the legal profession, he was called to the Irish Bar, and joining the Connaught Circuit at once commenced active practice. From a political point of view this date marks the darkest period which Ireland has witnessed in this century. The economic condition of Ireland in the years 1847-9 was exceptional in European history. The crisis which had been predicted since the days of Arthur Young was at hand. The numbers of the people had long exceeded all proportion to the normal produce of the soil. Commerce hardly existed. The landlords, instead of managing their estates themselves, had long pursued the custom of handing them over to middlemen, and the process of sub-letting had gone on for generations, until when landlords came to examine their property at the commencement of this century, they found it charged with an enormous population for whom there was no work, and for whom there was no subsistence but a share in the potatoes which the inhabitants of the same cabin might have among them. The concession of the Roman Catholic claims in 1829 had only served to disclose the extent of the mischief. The struggle for existence had already begun, and when the air was cleared of the sectarian questions which had unhappily too long occupied public attention, it was found that larger and much more difficult problems remained to be solved. It was then that O'Connell endeavoured to follow up his success on the Catholic question by undertaking to repeal the Act of Union.

But this impracticable scheme did not long occupy popular attention, and an active revolutionary propaganda overspread the country, whilst famine and disease preyed upon the people, and the bankrupt condition of the landlords made the outlook for the upper classes almost as desperate as that for the masses of the population. There could hardly be imagined a worse political atmosphere than

that in which young Keogh passed the years of preparation for active life. He was a boy when the Reform Bill changed the balance of parties in England, and with this change came considerable power and influence to the Roman Catholic party. Reforms were introduced, but in comparison with the enormous economic difficulties these changes were but trifles, and the pressure went on increasing. Men like Thomas Drummond foresaw the catastrophe which was at hand, and toiled incessantly to avert it. But the public generally were haunted only by a sense of coming disaster, and whilst the cries of the people filled the air, faction was indefatigable to profit by the storm. The noisy declamation of O'Connell's monster meetings, the savage invective of the great agitator, were the models of popular eloquence to which the ambitious young Catholic naturally turned, and in vehemence and energy the late judge was no unworthy pupil of the rough times in which he studied.

A less powerful nature would have stood aghast at the prospect which Irish affairs presented, when a few months after his call to the bar, the accident of a general election, and the recognition his brilliant talents as a speaker obtained from the Peelite party, gave Mr. Keogh the chance of entering Parliament. He had already obtained a good position as junior in his Circuit, and though it is true the Connaught is the least important of the Irish Circuits, an assured success on it would have been quite sufficient to secure Mr. Keogh a leading position in Dublin. A seat in Parliament necessarily means, for an Irish Barrister, a sacrifice of professional income. If a man enters Parliament when actually in the enjoyment of office, this loss of income is more than made up to him by his official emoluments, and his duties as Attorney or Solicitor-General keep him before the profession, but if he obtains a seat without any immediate prospect of office, and before his position is thoroughly established, he has not only to sustain the loss of income, but the risk of being

outstripped in professional position by those who are more exclusively engaged in the Four Courts. The late Chief Justice Whiteside was an example of a long Parliamentary career passed almost entirely in opposition, but his reputation was such that all the time he could spare from Westminster was eagerly claimed by clients in Ireland. He had already become recognised as the most attractive and persuasive speaker of his time at the Irish Bar before he entered Parliament. Young Keogh, whatever he might anticipate, had no such established reputation to fall back upon, whilst his political godfathers had little to promise him. They were Tories whom the Tories had discarded, and who held together as a party by their individual ability, and the accident of their seniority to newer men, rather than by any direct influence which they exercised outside. On the fall of Sir Robert Peel's administration in 1846, the Peelite party was chiefly represented in Ireland by the late Right Hon. Abraham Brewster, who was mainly instrumental in attracting Keogh to this side in politics, and the uncertainty of the outlook was sufficiently illustrated in the fact that Mr. Brewster did not attain that cherished goal of all Irish barristers, a seat on the Bench, until 1866, nearly twenty years after the time we now speak of, whilst Mr. Keogh had concluded his Parliamentary career by accepting a judgeship in 1856. But calculations of professional success or of party prospects were little heeded by the impetuous young barrister, who saw the arena of the House of Commons opened to him, and felt confident of his power to hold his own in it. Returned for Athlone, in 1847, by the aid of the Peelites and his personal connection, he continued to occupy the seat for the next nine years. The condition of Ireland at this time practically suspended the functions of its Parliamentary representatives. The business of Parliament was twofold, first, to bring its utmost aid in relief of famine, and secondly to apply promptly those measures of coercion



which the wild schemes of the "Young Ireland" party made necessary. In relieving the famine neither Government nor Parliament required any stimulus, and in the other measures it was not necessary that a representative of popular feeling, allied with a party in opposition, should participate further than by close observation and correction where necessary. Accordingly, Mr. Keogh's career during the early years of the Parliament of 1847 attracted very little attention, nor did he attempt any strong part in the House until 1851, when on the introduction of the Ecclesiastical Titles Bill he delivered a passionate philippic against the Government for what he denounced as their attempt "to rekindle religious hate" in Ireland. The Peelite party, generally, opposed the Bill, but this speech was more than a service to the policy of his immediate political associates. The Irish Roman Catholic members who ordinarily supported the Government of Lord John Russell, were, after the Durham letter, cut adrift from their party moorings, and the trenchant terms in which Mr. Keogh spoke presented him to the country as the leader and representative of the movement which the Roman Catholic Bishops set agoing with a view to the coming election. The member for Athlone became at once the champion of a party which was to be definitely organised and materially strengthened at the coming election. Mr. Keogh was the principal, and not the least popular of the speakers, at the series of public meetings organised by the Bishops in the autumn of 1851. A number of Englishmen who had recently joined the Roman Church were prominent in the electoral campaign, and made large contributions to the expenses, and the result was the return of some fifty members, pledged to defend the Roman Church and act as an Independent Opposition. The question of leadership was not pressed with that distinctness which has troubled the counsels of the Home Rule party in subsequent years, but practically it rested with William Keogh, Frederick Lucas, Mr. Moore,

and Mr. Duffy, now Sir Charles Gavan Duffy of Melbourne. Among these able men the most important Parliamentary position and the largest Parliamentary experience belonged to Keogh, whilst he also enjoyed the confidence of Mr. John Sadleir, a member of the party, who was supposed capable of assisting to develop a new commercial future for Ireland. Lucas represented the "neophyte" religious element, whilst Moore and Duffy typified different sides of Irish national feeling. All went merrily as long as the struggle with Lord Derby's Government lasted. The Peelites had kept aloof from that experiment, and worked cordially with the new Irish party in bringing about the fall of the Ministry. Then came the tidings that Lord Aberdeen's new Government included Mr. Sadleir as a junior Lord of the Treasury, and Mr. Keogh as Solicitor-General. The repeal of the Ecclesiastical Titles Act, a Bill on Education, above all a scheme on the Land question, made no part of the ministerial policy, yet these were only a portion of the programme to which the Independent Opposition was said to be pledged. A furious crusade was at once commenced against the new officials. The violence of the language used both in and out of Parliament has perhaps no parallel in our political life in the nineteenth century. The Ecclesiastical authorities encouraged it from their discontent with the spirit of independence which Mr. Keogh always showed in his dealings with the Church, and in the hope of forcing the Government to buy off the popular outcry by some concession. The Nationalists were delighted to have clerical authority to back them up in abusing a Solicitor-General, and the fury of the struggle was increased by the vehement scorn with which the attack was repelled. Mr. Keogh met his assailants with indignant defiance. His case was simply that he had come into Parliament as an adherent of the Peelite party, and from his professional position naturally a candidate for office, should that party have office to bestow.

His position on the Ecclesiastical Titles Bill was his natural one as a Roman Catholic and a Peelite. When the Peelites formed their new combination, office naturally fell to his share, and though he was anxious to reform the Irish Land Laws, and achieve other things, he did not see that his declining the natural result of his Parliamentary career would advance the desired ends. The contest had not died out when the suicide of John Sadleir and the failure of his bank revived popular excitement, and supplied a new topic of declamation against Sadleir's political associates. About this time, a vacancy occurring in the Court of Common Pleas at Dublin, Mr. Keogh accepted the post, and withdrew from Parliamentary life.

As a puisne judge in Ireland there was little scope for that strong, vehement nature; but no one, who ever attended even a sitting in chambers before Mr. Justice Keogh, will forget the freshness and life and noble zeal for justice which he brought to the business of his Court. He was not a learned lawyer, but he never failed to appreciate a legal argument, and his judgments were always distinguished by the clearness and precision with which he dealt with the questions before him. His demeanour as a judge at *Nisi Prius* extorted even from the Nationalist press testimonies to his dignity and impartiality.

When the increasing violence of the Fenian agitation obliged the Government in 1865 to seize the Fenian papers and prosecute the writers, Mr. Justice Keogh was chosen as one of the judges to preside at the series of trials which took place at the Court in Green Street, Dublin. His enunciation of Constitutional principles and his earnest appeals to the people to keep clear of the evil counsels which the Fenian agents offered, exposed him to a renewed storm of popular odium, and his position was the more remarkable from the fact that, though a Roman Catholic of distinguished ability and of irreproachable private life, the Roman Church encouraged rather than repressed the attacks made upon

him. Though he had been allied with the clerical party in his resistance to the Ecclesiastical Titles Act, he was one of the few Roman Catholics who did not owe his seat to the favour of his Church; and when the struggle connected with the Ecclesiastical Titles Act had passed away, he took every occasion of asserting in the House of Commons his attachment to law and the principles of public policy, as distinguished from that submission to Church authority which it was becoming the practice of Rome's supporters to demand from all adherents of their Church engaged in public life. His independence of the new Roman Catholic school was further illustrated by a literary discourse which the judge was invited by the Afternoon Lecture Society to deliver at Dublin in 1865. He chose Milton for his subject, and made the poet the text for a dissertation of great eloquence and power on the service done to human liberty by the Covenanters and the Commonwealth. There was nothing in his lecture beyond its force and glowing language which would have attracted special attention thirty years before, but coming from a Roman Catholic of brilliant parts and high position when Roman Catholic Ireland was being gradually nursed by Archbishop Cullen into the newest Ultramontane ideas, when the Syllabus had been already promulgated and the clerical powers were in all directions preparing for the Vatican Council, in such circumstances this panegyric on a heretic poet whose works had been placed on the Index, this eulogy of a political party whose career in Ireland had been long a subject of denunciation, produced in that island a sensation even greater than that occasioned subsequently by the more widely known Galway judgment. Cardinal Cullen, another typical character in the Ireland of the last generation, and who, within the last month, has himself passed away, made the judge's lecture the subject of a Pastoral to his flock, and unpopular as the judge had long since been, he thenceforth became the special object of clerical animadversion.

The powers given to the judges by the Corrupt Practices at Elections Act, 1868, opened a new field in which Mr. Justice Keogh's acuteness and experience of men shone to great advantage. The general election which followed in 1868, provided a large amount of work, and it is remarkable that in contrast with the attacks to which his conduct of the Fenian trials had been exposed, and with the uproar which followed on the Galway judgment in 1872, his large share in the Election trials of 1869 excited general admiration, marked as it was by impartiality, intelligence, and expedition. In 1872, Sir William Gregory vacated his seat for Galway on assuming the Government of Ceylon, and the present member for Galway, Major Nolan, offered himself as a candidate in the double capacity of a Home Ruler and the chosen of the Roman Catholic clergy. The public exercise of clerical influence was nothing new in Irish elections. In many constituencies it has been the practice for years past to announce a candidate by a declaration emanating from a meeting of the clergy at the Bishop's house. In Galway, however, there was this element of difference, a large number of the resident gentry were Roman Catholic, and they had hitherto had much to say in settling the representation of the county; moreover, they were on this occasion very much divided, many of them supporting Major Trench, a Protestant, but personally popular. It was only by introducing the new plan of popular nomination by the mouths of the clergy, such as had been already recognised in Longford and other counties of Leinster, and enforcing the nomination with the utmost vigour, that Major Nolan's election could be secured, and accordingly from one end of Galway to the other the whole resources of priestly organisation were brought into play. Mob violence and spiritual terrors were used alternately, as occasion might require, with the utmost freedom. Bishops' Pastorals and altar denunciations were almost as numerous as the paving stones that pursued Major Trench's

supporters. Major Trench relied on the facts to show that there was a general conspiracy to interfere with freedom of election, issued notices that his opponent had disqualified himself, and claimed that the votes given to him, the only qualified candidate, entitled him to the seat. There was no question that the proceedings of Major Nolan's supporters had invalidated his election. They were quite prepared for a renewal of the struggle, but such a system of persistence in lawlessness was anticipated by the provisions enabling the other candidate to disqualify his opponent in virtue of such practices, and claim the seat for himself as won at the particular election by the votes recorded for the only qualified candidate. After a long inquiry in Galway, Mr. Justice Keogh held that the notices were duly given, that accordingly the votes for Major Nolan could not be counted, and reserved for the Court of Common Pleas the question whether the seat did not belong to Major Trench. The decision of the Court in favour of Major Trench was, however, but a small matter compared with the fury which the Judge's picture of the clergy in Galway, and his comments on their proceedings, excited. Two Bishops and several members of the inferior orders were put on their trial, and the Roman Catholic power, which had seemed to enjoy almost universal dominion over the Irish constituencies out of Ulster since the General Election of 1866, appeared seriously threatened. The motion in the House of Commons for the removal of the Judge and the violent invectives with which the proposal was supported were, however, only the latest development of that quarrel between him and the priestly power which had been going on for years. We do not attach much importance to the theory that the strong nature of the Judge was seriously affected by the uproar which his impetuous rhetoric excited. His was rather a spirit that exulted in the storm, but however that may be, there had been for some

time past many signs of failing health, and on these there supervened a few weeks since a mental affection, which was soon followed by complete physical exhaustion, and his active stirring life was terminated last month at Bingen, on the Rhine.

In the Galway Judgment, and some similar utterances, Mr. Justice Keogh was too often carried away by the earnestness of his own convictions, and spoke rather with the passion of a partisan than with the calmness which befits the judgment seat. But whether we differ from him or not, whether we approve his language, or would have preferred somewhat different phraseology, it is impossible not to recognise in him a generous, glowing nature, which was actuated by a high sense of all that is strong and frank and noble, and which hated cordially every form of pettiness and falsehood.

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## VI.—ON THE AMENDMENT OF THE LAW.

By A. E. MILLER, LL.D., Q.C.,\*

ONE OF THE RAILWAY COMMISSIONERS.

**W**HEN I originally accepted the offer made me by the kindness of the Council of this Association, and undertook the office of President of the Jurisprudence Department for the ensuing year, I purposed calling attention in some detail to the principles upon which, as it seems to me, the work of law reform should be conducted, and the machinery by which it should be carried out. I have, however, found myself compelled completely to alter

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my design, partly because the scheme, as it were, broke down under its own weight—the time at my disposal turned out lamentably insufficient for the purpose—but even more, because I found that the ground had been in great part already covered better than I could hope to do it, and notably by my immediate predecessors in this chair.

Under these circumstances I thought that I could not occupy myself more usefully than by endeavouring to call attention as briefly as I can to a few of the questions which seem to me at present to call most urgently for reform. On one question indeed I shall be obliged to tax your patience at some length, not only because I consider it the most crying evil left unredressed in this country, but because I think the present time, when public attention has been so lately called to a flagrant instance of the abuse, a fitting one for making an exertion to procure its removal.

It will doubtless be expected that, at the outset of this address, I should make some allusion to the question of Codification which has not only for many years occupied a considerable share of public attention, but has also been specially commended to the consideration of this Congress.

As regards the particular Bill now before us I desire to say nothing; but on the general question of Codification I must ask you to bear with me for a few moments, though I am conscious that what I have to say will be anything but palatable to many.

I am convinced that the time has not yet come for anything like a successful attempt at a general codification of the Law; nay more, I doubt if it can ever come; nay more still, I have grave doubts whether if it had come, the end would be a desirable one.

Let me not be misunderstood. I have no greater love than any one else for the present chaotic condition of the Law; no one could hail with greater pleasure than myself



an authoritative Digest, which would replace by some twenty or thirty well arranged volumes the 2,000 odd volumes of statutes and reports, which every competent lawyer is supposed, if not to know by heart, at any rate to be able to find his way readily about in. The man who will undertake and carry out that will do a great work. But we are yet many steps from the beginning of that work, and when it is completed we shall even then not have progressed beyond the very threshold of a Code.

A Code, let me remind you, if it is to fulfil its office efficiently, must be a complete systematic enunciation of the law; so complete that no principle or proposition of law can exist for any practical purpose which is not to be found in it; so systematic that every thing that is there can be found with little more trouble than is involved in looking out a word in a good dictionary. Every question of law would thus be reduced to one of construction merely, and the best grammarian would, for all practical purposes, become the most competent judge. Now, without entering into any question as to the desirability of such a result, it is clear that, as a preliminary to its attainment, we must ascertain with precision the whole of the Law which we desire to enunciate, down to its minutest details, and must have an adequate idea of the mutual relations of its several parts. How are you to do this until you have first got hold of the existing Law in some manageable shape, and then determined precisely the mould in which you desire to recast it? Now this preliminary involves the preparation of a Digest. I know that it has been gravely urged that the process of Digestion and Codification can proceed simultaneously, that the codifier, that is to say, can make his own Digest and use it up in his Code as he goes along; and I will not deny that, on a small scale, and with reference to a limited subject, this may be practicable, but I am certain that, if you intend to do the thing so as to be of real permanent service, you must be satisfied to do one thing at a time,

and gradually build up your system by progressive stages, of which even a Digest is far from being the first. *Festina lente.*

It is now just twenty-two years ago—just the whole lifetime of this Association—since my attention was called to this subject by my being appointed one of the draftsmen employed by the then existing Statute Law Commission to prepare one of the Bills needed for the then contemplated consolidation of our Statute Law. I pointed out then, in the note which each draftsman was required to append to his draft, that the work could not be thoroughly and satisfactorily done until the actual state of the Statute Law had been accurately ascertained; and that for that purpose a carefully revised edition of the entire Statute Book, excluding all that had been repealed or amended or had become obsolete, was an essential preliminary. The idea was too prosaic for acceptance by the Commission, and accordingly they went on accumulating draft Consolidation Bills, which have ever since slumbered peacefully in some Government pigeon-holes or other, if, indeed, they have not long ago found their way to the buttermilk or the trunk-maker. At any rate, none of them, except Mr. Greaves's Criminal Law Consolidation Bills, has ever been submitted to Parliament. Some ten years ago, however, the plan of a revised edition was taken up by the present Lord Chancellor (certainly not upon any suggestion of mine, I can claim no part in it whatever), and within the last few months we have seen it brought to a completion by the publication of the fifteen volumes which contain all the existing Statute Law down to the year 1868, and for the first time render a systematic digest of that Law reasonably practicable. That edition is the fruit of the continuous labours of the Statute Law Committee for ten years: how long do you suppose it would take to prepare and edit, by authority, a similar edition of the reports? Certainly, not a shorter time: and yet, till that has been done, it would be hopeless to look for even a

reasonably good Digest, that is to say, a text-book which might be used as authority, and as containing *all* the authorities, on any branch of our Law; not to speak of a Code, which, as I have said before, is intended to supersede the unwritten as well as the written Law.

These preliminary steps, however, require nothing but time, care, and patience to carry them into effect. The same agency which has authoritatively edited the Statutes could, if so minded, issue an equally authoritative Digest, though that, if confined to the Statute Law, would be of but little advantage. But a similar agency could, no doubt, with the concurrence of the Judges, which we have no reason to suppose would be withheld, prepare—first, a complete edition of all that is still valuable in the reports; and then, such a Digest as well of the positive law contained in the Statute Book as of the common law so far as it has hitherto been formulated by judicial expression, as would bring before us in a manageable shape all that at present constitutes our Corpus Juris: it is when you propose to give to your Digest—whether further developed into a Code or not—that legislative sanction without which it must at best remain merely a higher sort of text-book, that your great difficulty will have to be encountered: and with our present system of legislation, and unless you can find a House of Commons ready and willing to take your law on trust and accept your measure as a whole—to do which you must return to the days of Henry VIII.—I do not see how such a measure as would be needed can ever be expected to become law.

The difficulty here referred to is not, however, by any means peculiar to this question, but one which, as it seems to me, more than any other retards all progress in law-reform, and is due to the very defective machinery which we employ for the manufacture of new laws, and the amendment of old ones; and the most important, if not the most pressing, of all reforms, is a reform in the machinery of legislation.

How can the framers of a bill of any importance be expected to produce a consistent and intelligible document when, no matter with what careful accuracy it may have been originally contrived, no matter what pains may have been taken to preserve its homogeneity, with the rest of the law bearing upon the subject, it is impossible even to guess at the form in which it may eventually become law. An amendment introduced *alio intuitu* may, perhaps in mere ignorance, destroy an important connection; may—not unfrequently does—by the use of some term in a sense different from that in which it is used elsewhere, introduce an element of ambiguity into the whole Act; may even, as the result of some compromise upon a question of detail, introduce unforeseen complications which go far to render the whole measure unworkable. And all this because, not content with deciding every question in difference—which is clearly within their competence—the House at large insists on settling, if necessary by division, the precise form of words in which their decision is to be enunciated, an office for which they are eminently unfit. Hence result delays and difficulties in the progress of any measure of importance, which have become proverbial; hence the necessity of extensive, sometimes oppressive, litigation to determine the construction of every new statute; hence, worse than all, the perpetually recurring necessity of fresh Acts for the amendment and re-amendment of old ones; till instead of a single systematic and intelligible statement of the law, you are overwhelmed by a congeries of conflicting enactments, scattered at random through a wilderness of volumes; and after the expenditure of infinite labour, the last state of the Law on the subject is worse than the first.

The remedy is simple, and is not now propounded for the first time: I can lay no claim whatever to originality in the suggestion I am about to make, but I have all the more confidence in its soundness.

Without a standing Committee, which should be respon-

sible for the language—but the language only—of all Acts of Parliament, and which should be supreme upon all questions of wording, it is hopeless to expect our legislation to be either intelligible or consistent.

Such a Committee ought not to be numerous, certainly not more than five in number : and should be given such a position as to rank and salary as would secure the acceptance of the office, which ought to be a permanent one, by the most experienced parliamentary draftsmen of the day. To this Committee every Bill should be referred as soon as it has been read a second time ; and it should be their duty to point out all inconsistencies of language, either with the Bill itself or with any part of the prior law not proposed to be repealed, and to make suggestions for their removal. After the Bill has passed through committee of the House it should be again referred to this Committee, who should now be bound to introduce all the amendments made by the House in appropriate language, so as to give effect to the intention of Parliament in the best possible manner. It should, of course, be competent for the House to recommit the Bill and then send it back to the Committee with further instructions ; and this process might be repeated indefinitely ; but no alteration should be allowed upon report or on the third reading of any Bill, nor should any Bill be proposed for third reading except in the shape in which it has last left the standing Committee.

I know that it will be said that the process here described is too cumbrous to work, and that the waste of time involved in the passage of the Bill back and forward between the House and the standing Committee would be prohibitory of all legislation whatever. I do not concur in this opinion : I am satisfied that on the whole more time is consumed in the verbal discussions now inevitable in the course of any measure of importance through Committee than would under the plan suggested be ordinarily required for the whole passage of the Act ;

because all questions of language being removed from the cognisance of the House and reserved for the Committee, the former body would be occupied with questions of substance only, with a saving both in time and labour, which only those who have carefully followed the progress of a hotly contested Bill can fully appreciate.

And even if this hope were deceived, if it should turn out, contrary to all reasonable expectation, that under the new system we succeeded in passing somewhat fewer Acts of importance than are passed now, the improvement in the quality of legislation would be cheaply purchased even by a considerable diminution in the quantity thereof; to say nothing of the enormous waste both of time and money in the shape of litigation, from which we might fairly hope to be delivered.

Among the most disastrous of the consequences of this very defective system of legislation are the impediments thereby thrown in the way of the assimilation of the laws of the different parts of the Kingdom. No one will, I presume, contend that it is otherwise than desirable that the whole of this nation should, so far as practicable, be governed by the same laws: I do not mean, of course, to challenge the desirability of what is known as Local and Personal legislation, nor do I deny that occasional differences of circumstance exist which require a corresponding difference of treatment, but I think that it will be accepted almost as an axiom that the general law affecting the whole Kingdom should be, as far as possible, identical.

As regards Scotland there are, I admit, considerable difficulties in the way, because the law of Scotland proceeds upon a basis essentially different from that of England, though even these are not, I think, nearly so formidable as they are commonly considered. But in the case of Ireland this difficulty does not exist, the basis of the law there and here is precisely the same, and with a rational system of legislation there would be no difficulty either in bringing the laws of

both islands into substantial harmony, or in preserving that harmony when created. Instead of this, under our present system of legislation, the laws of Ireland and England are more widely different now than they were at the date of the Union: instead of legislation for the two parts of the country being, as it ought to be, always simultaneous and ordinarily identical, the practice of separate legislation, even when no diversity is intended, has become almost inveterate.

There is, it is to be observed, no question as to the desirability of identity of legislation for the two countries in matters common to both—thereon opinion is unanimous—but when the time for legislation arrives this opinion is not acted on. Separate legislation ensues. Then years afterwards, under the pressure of necessity, a spasmodic effort is made, and the differences, which ought never to have arisen, are more or less imperfectly removed. But there is no recognition of the fact that the unity which it was desirable to attain had been attained, and therefore should not again be lost—there is no guarantee afforded that once assimilated the laws shall remain similar—and so every now and then the vicious circle is once more entered on. I can find no argument in favour of such a state of things. No good end can be attained, no object realized, by needlessly perpetuating old differences, still less by needlessly creating new ones. Separate legislation increases the labours and unnecessarily occupies the time of Parliament. It precludes English members from taking due interest in Irish affairs; it keeps alive a false impression of the existence of separate interests; and what is to be above all things noticed is that it can lead to no definite end.

I cannot more forcibly illustrate the working of the present system of separate legislation than by reference to the great attempt at Codification already mentioned. It is a Bill of unusual magnitude. It repeals the whole of the present statute law on the subject of indictable offences,



and attempts, or at any rate professes, to substitute a Code in the place of the present law, both statute and common law, in regard to the subject. It deals with offences against public order, internal and external; with acts injurious to the public generally; with offences against the person, the conjugal and parental rights, and the reputation of individuals. It introduces new principles of law in some of these matters. The measure, however, is confined to England. Ireland is excluded from its operation; and so, if it should be passed, the laws of England and Ireland in all these numerous subjects—laws which, after years of labour and numerous Acts of Parliament, are now almost, if not quite, identical—will once more be dissimilar. Years hence, possibly, a similar measure will be passed for Ireland; but in the intervening years the laws will be dissimilar, and even if the experiment succeeds there will be an Irish Code and an English Code, which will be certain not to be identical even when not substantially different, and the golden opportunity will have been lost for enunciating the law in a form not exclusively English or exclusively Irish, but common to both countries.

I would, did time permit, pursue this subject in some detail, but I must confine myself to one other illustration of the matter which seems to me of capital importance. Next to the Criminal Law there is, perhaps, no subject so entirely common to the whole Kingdom, or in which there is less reason for divergence of legislation, than the laws relating to the relief of the poor: and yet there is, perhaps, none in which the divergences are more striking or inconvenient. The English law is still based upon the old style of settlement enforced by removal—which has been rightly described as “a harsh, complicated, and expensive machinery for enforcing the chargeability of districts to support their own poor.” In Scotland this chargeability is enforced, without removal, by an action by the relieving parish against the chargeable parish to recover the cost of relief, *when both*



*parishes are in Scotland*, but if one of them should happen to be in England or Ireland, this remedy cannot be resorted to, and the only way of enforcing chargeability is by removing the pauper. In Ireland, the Law of Settlement and removal is wholly unknown, and the pauper remains a charge upon the Union where he happens to become destitute, there being no power of removal except in the case of paupers previously removed from Great Britain. None of the systems is a good one, but a very reasonable system might be readily compounded out of the best parts of the three, if our system of separate legislation did not practically preclude anything like combined action for the purpose.

Passing now to a brief consideration of a totally different question, I desire your attention for a few moments to that which I cannot but consider the most “burning” question of the day,—and that notwithstanding the adverse opinion not long since expressed by the high authority of a Royal Commission,—I mean the law affecting the custody and control of lunatics.

The same principles which lead us to provide, at the cost of the State, for those who are unable by reason of poverty to support themselves, lead even more irresistibly to the public guardianship of those who from mental infirmity are unable to take care of their persons or their property. But just as it is an essential characteristic of a good poor law to interfere with the normal conditions of the pauper so far, and so far only, as is necessary to guard the administration of the public alms from extravagance or abuse, so it is essential to a good lunacy law that its operation, both as to the persons to be affected, and as to the amount of restraint to be enforced thereby, should be as restricted as is compatible with proper care of the lunatics themselves, and due protection of others from the results of their infirmity. So long as these conditions are fulfilled the action of the law should be sedulously maintained at a minimum. Hence it follows

that the two cardinal principles of a good lunacy law should be—

1. To secure that no one should be liable to be treated as a lunatic without the most searching inquiry, conducted in public, and by a competent judicial officer, so as to preclude, as far as may be, the possibility of fraud, accident, or mistake.

2. So to provide for the control of lunatics as to interfere as little as may be with the free exercise of their natural liberty.

These principles are, indeed, so far recognised by our law as it stands, as to be, with one important exception, fairly applied to the class known as “Chancery Lunatics”—lunatics, that is to say, who are possessed of property sufficient for their own support, and the administration of whose property is undertaken by the Crown through the agency of the Lunacy Office. As a rule adequate care is taken in determining the status of these persons, and their property is ordinarily managed with an anxious care to provide first for their own comfort, according to their means and station in life, and then from those legally or naturally dependent upon them, or who may be considered as having such moral claims to assistance as a reasonable man in a lunatic's position would be tolerably certain to recognise.

The exception, which I merely mention at the moment, as I shall have to recur to the subject at some length, is this: that whether from a mistaken delicacy of feeling toward the alleged lunatic himself or his friends, or from false motives of economy, the inquiry into the mental condition of an alleged lunatic may be, and, unless he has the advantage of independent legal advice, ordinarily will be, conducted in private, often even with studied secrecy. Indeed I have heard this practice claimed as a merit in the Lunacy Office, instead of being recognised, as I think it ought to be, as a serious blot upon its procedure. But when

we come to those lunatics—by far the larger number—who either have no property, or whose cases have not been brought under the cognisance of the Masters in Lunacy, the law is not content with ignoring the principles above enunciated, it even acts in the precisely contrary direction. It assumes that the normal result of lunacy is to be incarceration, and it entrusts the conduct of the inquiry, which may have so terrible a result, not to an impartial public officer, but to the nearest relative of the victim—to the very man, that is, who may have the strongest imaginable motives for desiring to control the result. And, worse than all, it enables this inquiry to be so held as to be reduced to the merest farce. Two medical men, neither of whom need be, or ordinarily is, possessed of any special acquaintance with the subject of mental phenomena, have separate interviews with the victim, whom they may, and often do, then meet for the first time in their lives : they come, or may come, to this interview, carefully primed as to the “delusions” to which the “patient” is subject, and their instructor must be a bungler indeed, or the case an extraordinarily hopeless one, if sufficient cannot be elicited from some peculiarity of temper or manner to justify, or seem to justify, the foregone conclusion desired. In accordance with this conclusion, a certificate is then signed, which suffices to warrant the forcible arrest of the victim and his removal to a house of detention (called a private asylum), from which his chances of liberation are in inverse proportion to the truth of the accusation—for such it is in effect—against him. A really insane man may have some hope of being released, and placed under rational control ; but only by a combination of favourable circumstances little short of miraculous can the sane victim of avarice or malevolence hope, under present regulations, to baffle the interested vigilance with which his jailors set themselves to defy investigation. Now, I do not hesitate to say, that under no possible circumstances can these so-called private asylums be otherwise than an evil. I do

not, of course, pretend that a lunatic should in no case be subjected to personal restraint; that would be manifestly absurd; but I do say that the cases in which such restraint is otherwise than noxious are exceptional. These cases may be reduced to three classes.

1st. Dangerous lunatics: those, that is to say, who have either been guilty of some acts of violence, which in a sane man would be criminal, or have shown such a tendency to violent outbreaks as renders their unrestricted freedom a menace to themselves or others. The public safety requires that these should be kept in detention, and whatever name we give to the place where they are kept, and whatever may be its accessories, it is, as regards them, in object, and in effect, a prison.

2nd. Pauper lunatics: in which class I include not only those who are technically paupers, supported wholly at the public expense, but also all those whose means are insufficient for their maintenance, and who therefore must rely more or less for their support upon the action of charity, public or private. This case is governed by the same economical considerations as that of sane paupers (save that the element of individual option is of course excluded), and just as in that case we found that relief can be most properly and economically administered through the machinery of the workhouse, we are lead in this case to adopt that of the public asylum.

3rd. There are a few instances of persons affected with insanity, either of a temporary nature, or so connected with some other malady—ordinarily epileptic—as to require and be benefited by systematic medical treatment, and which if not so treated will probably become permanent or be otherwise sensibly aggravated. To meet such cases as these it may be necessary to permit medical men, who choose so to occupy themselves, to receive isolated patients, and to detain them in their houses under proper control. But under no circumstances should more than one such inmate

be permitted in any house. Cases of this sort are always aggravated by contact—I would have said contagion, but that that word has a technical meaning, and would therefore be liable to be misunderstood.

In all cases not coming within some one of these classes any forcible restraint of the lunatic, even under the most favourable regulations, is always an evil, often a cruelty.

In all this, as will have been seen, there is no place for the private asylum; nor can I conceive any case in which such an institution could operate for the benefit of any lunatic. So far as these places have any legitimate function at all, they operate not for the benefit of the lunatic but of his relatives. It is, no doubt, highly convenient to be relieved of the care, perhaps also of the incumbrance, of some imbecile brother, or son, or nephew, sometimes even to conceal the fact of his existence, and it is probably not always realized at what a sacrifice to the individual this is ordinarily accomplished. The hopeless idiot, indeed, apparently devoid of all but the merest animal sensation, may suffer nothing from being removed from all family associations, so long as his food is brought to him regularly, and he is sufficiently housed and clothed; but the ordinary "harmless lunatic," the person subject to more or less intense aberration of intellect, is keenly alive to such surroundings, and suffers greatly, more than is apparent to the mere casual observer, when deprived of them. We justly reprobate as inhuman the conduct of those who shut up their afflicted relatives in their own houses in secret chambers, and study rather to conceal their existence than to provide for their comfort; but I am unable to take any more lenient view of the conduct of those who, for their own ease or advantage, deny to these unfortunates the greatest mitigation of their misfortune which their case admits of, personal intercourse with those to whom they are attached, and condemn them to a loveless existence, with no better associates than their companions in misfortune and their

common jailors. Even for the custody of the really insane, then, the private asylum serves no useful end, but it is as an engine for the incarceration of the sane, or partially insane, that it becomes a truly dangerous evil.

If we rightly deprecate the forcible detention even of the harmless lunatic, as imposing upon him an unnecessary hardship, what are we to say of the lot of those, not, I fear, so few in number as is ordinarily supposed, who though in fact perfectly competent to take care of themselves, find themselves deprived of their liberty upon a charge of insanity, arising not out of any act of maniacal violence, but sometimes from the presence of some harmless delusion, not materially affecting the general conduct of the victim; sometimes from some eccentricity or weakness which the timidity or suspiciousness of friends or relatives has magnified into madness; sometimes from motives of mere cupidity, to prevent the anticipated alienation or dissipation of an inheritance to which the incarcerator has, or fancies he has, some claim; not seldom, I fear, from deliberate wickedness, which takes advantage of the imperfections of the law to put out of sight as a lunatic some one whose presence is felt to be dangerous or inconvenient.

I know that I shall, on this part of the case, be referred to the various agencies provided by law for the inspection of asylums, and be assured that it is practically impossible, in the face of these safeguards, that any sane man could be long kept in detention who was even reasonably anxious to take advantage of the opportunities for his liberation afforded him by the law. Now I will not only rely upon the stories which have been told, with considerable plausibility, of steps having been taken in some of these asylums to prepare for the coming visitation, either by concealing the dangerous inmates, or by even darker and more reprehensible practices, because, so far as I have been able to learn, the authority for these statements rests on common rumour only—tradition as I may say—and I cannot find that any

specific instance of any such practice has been established by credible testimony. But even without this it must be obvious that no mere official—and therefore inevitably more or less perfunctory—inspection can ever suffice for the prevention or detection of fraud when opposed to the resources of interested unscrupulousness. And indeed the law itself seems in this respect to play into the hands of the incarcerator. So long as the asylum is looked upon as the fitting house for the harmless lunatic, nothing short of almost superhuman energy, determination, and sagacity, upon the part of the visitor would suffice to compete, with reasonable probability of success, with the contrivances at the disposal of those who are interested in prolonging the imprisonment. It is so easy to suggest the existence of “delusions,” which the victim cannot confute, nay, may even in ignorance of the suggestion, appear to confirm, and which the visitor, unacquainted with the history of the alleged lunatic, has no means of testing: or to speak confidentially about lucid intervals and dangerous paroxysms, assertions which from their very nature defy investigation. We have all read, in Captain Marryat’s novel, how Peter Simple was detained as a lunatic by his uncle, the alleged delusion being that he thought his name was Simple, and that he was nephew and next heir to Lord Privilege: and how, as these “delusions” were the exact truth, Peter was made the unconscious instrument of his own continued detention, till an accident, such as seldom occurs in real life, led to his being seen and recognised by a friend of too much importance to be ignored, and too much interested in his case to be easily put off. This is of course but a novelist’s conceit, but it will serve as an apt illustration of what the law allows, nay, even ignorantly abets, and is for this purpose not a whit less cogent than if it were an ascertained historical event. The fact that such a thing is possible is as complete a condemnation of the system *as a safeguard against fraud*, as if it were a daily occurrence.

Again, it must be borne in mind that once immured in the private asylum the victim, sane or insane, is practically cut off from all communication with the outer world. The law, indeed, is not directly to blame for this aggravation of his lot: the law requires all letters written by him to be forwarded to their respective destinations; but the all but universal practice is that all such documents are transmitted at once to the incarcerator. Except by accident or some unusual cunning on the part of the lunatic, no information about him can be obtained by any private friend or disinterested relation which the author of his detention desires to suppress.

And it must not be forgotten that in this "game" the incarcerator runs but little risk, the asylum-keeper none at all. For while he has all the chances in his favour which I have endeavoured to point out, he can in the last resort, if all else fails, fall back upon the duly recorded certificate of two medical men, upon which the patient was originally admitted; and this, even if insufficient to prevent the escape of the victim then, will, at all events, secure immunity for the past. And this brings me to the point which I consider the crowning blot upon our law on this subject as it stands, the one exception of any importance to the commendation which I was enabled to bestow upon the administration of the Lunacy Office, and the foundation of all or most of the other abuses to which I have adverted: I mean the power of procuring a man to be adjudged a lunatic without a public inquiry. But for this power, the unlawful detention of sane men, and the unnecessary detention of harmless lunatics, would become as rare, and as easy of detection and punishment, as any other case of false imprisonment, and this end once attained the worst evils of the system would speedily disappear.

I have already pointed out how the simple certificate of two medical men, given under conditions calculated to deprive it of all weight—unsworn, not subject to cross-examination, not giving any grounds for the opinion expressed,



not showing any special fitness in the signer, and not requiring any real acquaintance on his part with the alleged lunatic—is ordinarily sufficient to warrant the imprisonment; but this will not enable the incarcerator legally to exercise any control over his victim's property. In many cases this is not required; where it is, however, certain further formalities are needed. And it must at once be admitted that if the alleged lunatic be at large at the time that proceedings are taken for an Inquisition, and if he be determined to assert his right to liberty at whatever cost, the law enables him to do so with reasonable security. He may demand, and must obtain, a public investigation before a jury, and cannot be deprived of his freedom otherwise than by verdict. But he is not entitled to this as of course; no one is bound to inform him of this right; and if he does not formally make the demand within a limited time, he is liable to be found lunatic as the result of a strictly private—it would not be too much to say hole-and-corner—inquiry before a Master in Lunacy. If the “lunatic” be at the house of a friend, the Master and his clerk, often unaccompanied by any other human being, repair thither: the lunatic is seen, or not seen, as the case may be, by the Master, some purely formal evidence is given, which as often as not is not subjected to any test whatever, and, unless the case be so glaringly absurd that the Master cannot help seeing through it by bare inspection, the desired report is made to the Lords Justices, and the man is “found lunatic by inquisition” as a matter of course. Now suppose the victim of this proceeding to be already in a private asylum: is it likely that he will ever hear of the petition against him so as to enable him to demand a jury? or that, if he did so, his demand would be forwarded to the Lunacy Office? We may be sure that in every such case the procedure would be such as that I have just described, with the added circumstance that all the surroundings would be carefully arranged to compel the Master, so far as might be, to arrive at the desired conclusion.

I am not unaware of the arguments by which this system is defended: I have listened before now to a recital of the hardships which it would entail, not only on the lunatic himself, but on his sane relatives, if all the skeletons in the family closet had to be paraded in the full glare of daylight; I do not deny that a public investigation, such as I think needed, would be necessarily expensive, and would frequently, perhaps ordinarily, arrive at the same result as the present; and I have been asked somewhat triumphantly whether it is reasonable to sacrifice the dearest feelings, perhaps the best interests, of a whole family in order to bestow a doubtful boon on one who, in a multitude, if not the majority, of instances, would be incapable of appreciating it.

But these considerations, weighty as they sound, seem to me altogether overpowered by the reverence due, and in every other instance paid, to the claims of personal liberty. If no one would think of inflicting permanent imprisonment without public trial as the result of crime, however flagrant and notorious, with what consistency can we apply to misfortune a rule which we consider too harsh for guilt?

It is true that to meet the case of violence actual or reasonably apprehended, some power of summary arrest for temporary purposes must be entrusted to some authority capable of immediate action at any time; this is a matter of mere detail which might easily be adjusted; probably the same authority which now authorises the apprehension of an alleged criminal and his detention until trial, might safely be entrusted to perform a similar function in the case of a person alleged to be a dangerous lunatic.

The suggestions, then, which I would make as to the required reforms in the law upon this subject, are the following:—

1. No inquiry into the sanity of an alleged lunatic, whether by a Master in Lunacy or otherwise, ought to be held in private; in order to authorise the detention of any

one as a lunatic such inquiry ought to be public, to proceed exclusively upon sworn evidence, given by witnesses produced for cross-examination, and ought to be conducted by a competent judicial officer, assisted either by a jury or by sworn medical assessors at the option of the alleged lunatic, but in no case acting upon his own judgment merely. The cost of every such inquiry ought to be borne in the first instance by the person instituting the same, but he should be recouped out of the lunatic's property (if any) whenever the case was satisfactorily established.

2. No lunatic should be liable to be forcibly detained in any asylum, or otherwise, until it had been established, in some judicial proceeding, that he was "dangerous"—this word to have the meaning already explained—except under circumstances provided for in the next two suggestions.

3. No lunatic, not dangerous, should be received into any public asylum without a special order from a justice of the peace, which should not be given without evidence that, in the absence of such order, the lunatic was likely to be a burden on the rates.

4. Private lunatic asylums should be altogether abolished, and no person receiving lunatic patients into a private house for medical treatment should be permitted to receive more than one at a time.

It will be remarked that these suggestions deal exclusively with the custody of the lunatic's person, and in no way affect the care of his property. I do not wish to be supposed entirely to assent to the law as it stands in this respect, but the subject is not a pressing one, and rather calls for reform in administrative details than for any material alteration in principle.

Another question which calls for the immediate attention of law reformers, but upon which, for obvious reasons, I shall touch but lightly, is the law for the Regulation and Control of Railway Companies. I presume that no one will expect me to express any opinion upon the question, which will have

to be determined by Parliament next session, what is the most fitting machinery for this purpose? a question which has given rise to a great deal of somewhat acrimonious controversy, and upon which I have no opinion sufficiently formed to be of any value, even if it would be becoming in me to give utterance to it. But I assume it as an axiom that *some* public control over the administration of our national highways is a public necessity, and that that control cannot be efficiently maintained by the ordinary action of the law applicable to common carriers generally, or, indeed, by any action at all which does not partake of an administrative as well as a judicial nature. What the character of the tribunal should be which is to be entrusted with this authority; what should be the extent of its powers, or the nature of its interference; how far it should be independent, and how far a part of our general judicial system; these, and all questions of this nature, I prefer to leave for others to answer. But the practical monopoly of the carrying trade of the country acquired by the railway companies (not, as in the case of coach proprietors or steamboat companies, as the legitimate result of free competition, but by means of exceptional powers granted to them by the Legislature), renders it puerile to expect, as some of their advocates profess to do, that they can be dealt with upon the same footing as ordinary trading companies, who are entitled to carry on their business as they please, and with an eye to their own benefit only, so long as they are reasonably honest. Further, it has been proved by the inexorable logic of facts, that the action of competition between railway companies is not in ordinary cases sufficient, as it usually is in the case of other traders, to secure a due regard to the public interest; and it is therefore requisite, if the companies are to have an independent existence at all, that they should be subjected to some "Board of Control" capable of holding an even hand between the shareholders and the public. This, the directors, were they ever so willing, cannot do; nay,

more, were they ever so able they ought not to do so: the first duty of a director is to his shareholders, and the interests both of the public and the companies will be best considered by a fair recognition on both sides of this fact. Surely it is not too much to hope of the good sense and moderation of those who practically control the action of this very important interest, that they will look the position fairly in the face, and instead of struggling hopelessly to maintain the untenable, will loyally assist in devising the best scheme for affecting the desired object: the one, that is, which will combine the necessary official control with the minimum of interference with the internal arrangements of the companies. Were they honestly to set themselves to attain this object, I do not doubt their ability not only to devise, but to carry through Parliament, a measure sufficient to afford an effective guaranty to the public without offending unduly even the susceptibilities of railway management. Intimately connected with this subject is the question, already amongst the burning questions of the day, of the liability of railway companies to their servants in respect of injuries arising out of negligence on the part of fellow-servants. This question was considered at some length at the sessional meetings of the Association, in the course of last year, in the discussion of a very valuable paper upon a Railway Insurance Scheme, similar to that prevailing in Germany, contributed by my friend Mr. Joseph Brown, and I do not think that any observations of mine here could add anything to the result of that discussion. It seemed to be the feeling of the Association then—and I, for one, entirely concur in it—that, on the one hand, the old rule about “common employment” is inapplicable to the case, at least in the crude form in which it has hitherto been applied to it; and that, on the other, the demand made by some of the advocates of the railway employés is extravagant and inadmissible. It is, on the one side, absurd to treat every plate-layer and pointsman as the fellow-

servant of the ganger or station master, whose orders he is bound to obey—or, for that matter, of the general manager himself; but it is equally unreasonable to contend that the relation of employer and employed can be wholly disregarded in considering the action and limits of the liability in question. There does not seem to be any insuperable difficulty in devising a middle course, at once rational and sufficient, which would afford to the men protection from all risks which do not reasonably come within their contract, without imposing upon the companies a liability against which they would be powerless to protect themselves, and the amount of which would necessarily be formidable, probably ruinous. When it is recollected that the mortality from accident among railway servants in England alone exceeds 1,500 per annum, it will be perceived that we are dealing with no merely speculative grievance.

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## VII.—SELECT CASES: SCOTTISH.

BY HUGH BARCLAY, LL.D.

### **Master's Liability for Fault of Servant.**

A miner engaged in work of a company whose managers were competent persons, but from fault on the part of the underground manager, a boy lost his life whilst engaged under a contractor to form a level: *Held*, by seven Judges, in an action for reparation by the father of the boy against the mineral company, that they were not liable, because liability for injury applied only to strangers, and not to a person connected with the work, and not from personal fault of the master. Per Lord President (Inglis): "As the result of the whole authorities, it appears to me that one of the conditions subject to which every man must become a member of one of these great organisations of labour, is that he shall take on himself all the perils naturally incident to the

work he undertakes, without looking to any one else to guarantee him against, or indemnify him for, injury sustained from the occurrence of such perils. This does not interfere with the principle for personal liability for *personal* wrongs or negligences, but it excludes all notion of what, for the sake of distinction, I shall call *secondary* responsibility." Lord Justice Clerk (Lord Moncreiff) dissented: "The propositions which I laid down to the Jury were two: first, that the company were liable if the person injured was not *their* servant, but was the servant of an *independent* contractor, and the second was that, on the terms of the contract, Gardner was an independent contractor, and that the deceased was *his* servant, and not the servant of the company; and the provisions of the Mines Regulation Act, and the rules of the pit under them, did not affect the relations of the parties in this respect." 10 Feb., 1877. *Woodhead v. Gardner's Mineral Company*, 4 S.C., 469.

#### **Master and Servant--Liability.**

In an action of damages by a miner against his masters for personal injury sustained: *Held*, that there was no proof of fault on the part of the masters, and, they therefore were assoltized. Per Lord Ormisdale: "It has been held as settled that the owners of pits are not responsible for injuries sustained by the miners in their employment through the fault of their fellow-workmen, including the manager, engaged in the same common employment. All that can be expected is that they appoint proper and competent managers and others to direct and superintend and carry out the operations." 23 June, 1877. *Stewart v. Coltness Iron Company, and Dewar*, 4 S.C., 952.

#### **Principal and Agent--Frauds.**

A stockbroker's clerk, who had authority to represent his master on Exchange, entered into transactions for his own behalf in the principal's name, and for which he was bound. To meet a balance due by the principal, resulting from the speculations of the clerk, the latter forged a cheque on a bank and applied the proceeds to that purpose: *Held*, the principal was bound to repay the sum to the bank in respect—1st, that the money was obtained by the fraud of his representative; and 2nd, that he had been benefited by the fraud to that extent. Per Lord President (Inglis): "An agent will not be held authorised to commit a forgery or any other wrong, but if in the course of his doing business he does commit a wrong or crime,

and if the principal is benefited, then he is liable to the extent to which he is benefited." The English cases of *Scholefield* (9 March, 1859) and *Barwick* (18 May, 1867) were chiefly relied on. 9 March, 1877. *Clydesdale Bank v. Paul*, 4 S.C., 626.

#### **Bankruptcy—Bill of Lading.**

A. shipped a cargo for a foreign port, and made out the bills in name of B., and authorised him by letter to hypothecate the goods, and in return A. obtained bills from B. which he discounted with a bank, handing them the bills of lading and letter of authority. The bank sent these to a merchant at the port of delivery, who sold the goods, which only partially realised the advance. A. became bankrupt, and B. insolvent: *Held*, that in ranking on the estate of A. the bank was not bound to value and deduct the goods, as in a question with them the goods must be held the property of B. Per Lord Adam: "The bank did not transact in any way with A., but with B., with whom, as holders of the bills of lading, and therefore as having a title to the goods, they were entitled to transact as owners. The bank are bound to account with B. for the proceeds of the goods, and not to A." The English case of *Brett* (6 Ch. App. 838) was referred to. 13 March, 1877. *British Linen Co. v. Gourlay*, 4 S.C., 651.

#### **Ship—Carrier—Bill of Lading—Negligence.**

A bill of lading very confusedly expressed had the usual clauses—"to deliver the goods in like good order and condition as received." "But *not* to be accountable for leakage, breakage, &c., however caused, or for certain enumerated perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for which acts the shipowner is liable or otherwise." A Jury returned a *special* verdict finding that damage had been sustained to the cargo through the negligence of some of the crew. The Court ordered the verdict to be entered up for the defenders, the shipping company, in an action by the freighters for damage done to a cargo of wheat by admission of sea water. Per Lord President (Inglis): "The proximate cause of the injury was sea water, but that sea water was admitted to the hold of the vessel by the negligence of the mariners, and for that, at common law, and independent of express stipulations in the contract of affreightment, there cannot be the smallest doubt that the shipowners are liable." "There is nothing to



prevent shipowners stipulating, and shippers agreeing that the ordinary liability of the shipowners shall be entirely discharged, and, although in form they undertake to deliver in the like good order and condition, they shall not in effect be liable to do so." "Conditions must be interpreted *contra proferentem*, on the other hand there is another kind of construction applicable to a bill of lading, and which must not be subjected to a too critical verbal interpretation. Documents of this kind are never grammatically expressed, and just as little are they expressed with any logical precision or accuracy, and therefore we must be content to construe the language, not critically, but according to what is the apparent meaning of parties." "I cannot say I arrive at the conclusion of entering the verdict for the defenders without regret, because I am perfectly satisfied that the limitation of the liability of shipowners in the manner here stipulated, making them not responsible for any amount of negligence or misfeasance upon the part of their own servants is likely to lead to a great deal of negligence, and to be attended with very disastrous results. But if parties will contract in this form, I can do nothing but give effect to their contract." 16 March, 1877. *Steel and Craig v. State Line Steamship Company*, 4 S.C., 657

#### **Inspection by Medical Persons of a Pursuer before Trial.**

In an action for personal injury the defenders' agent required the pursuer to submit himself to the inspection of three medical gentlemen. The pursuer objected to one of their number as being the medical adviser of the defenders' company, and on other personal grounds. On a motion for an order the Lord Ordinary refused the order in so far as it applied to the gentlemen objected to. On an appeal the Court granted the order applicable to the three. Per Lord Justice Clerk (Lord Moncreiff): "The pursuer says, that we are not to interfere with his liberty in the matter, because to grant the order craved would be on the one hand practically to compel him to be pre-cognosed, and on the other to subject him, while suffering under serious nervous affection, to an interview which must necessarily be disagreeable to him in the extreme. I think there is no doubt, however, that we have power to make this order which the Lord Ordinary has refused, if we are satisfied that it should be granted. When a man says that he has suffered personal injury, and craves reparation therefor, the question of his physical condition after the alleged injury is the most important element in the case. If he is not to be inspected

prior to the trial, it is evident that the defenders must be put to a most serious disadvantage, amounting almost to deprivation of skilled medical evidence." "I should be slow in a matter of such delicacy as this to disregard any objection made to examination by a particular doctor, even though the objection appeared to be somewhat fanciful. But I am satisfied that the objection taken here should not be entertained, and that the order craved should be granted." 17 May, 1877. *Junner v. North British Railway Company*, 4 S.C., 686.

#### **Ship—Merchant Shipping Acts, 1854 and 1862.**

*Held*, that the owner of a vessel, who was entitled to have his liability for damages, caused by the collision of his vessel with another, restricted under Section 54 of the Act, 1862, after presenting a petition for restriction, under Section 514 of the Act, 1854, was entitled to state a claim in right of parties whose claims he had settled extra-judicially before presenting the petition, and so limit the ranking of the other claimants. Per Lord President (Inglis): "The only difficulty is that the claims settled are not properly here, and cannot be given effect to. Technically, perhaps, the claims are not here, as the money has been paid. But if the owner has satisfied and paid the claims that will not deprive him of the benefit of Section 54 of the Act, 1867, and make him liable to a greater extent than £8 per ton. There is nothing in the Statute, and nothing in common law to lead to such a result." 19 May, 1877. *Rankin v. Raschen and others*, 4 S.C., 725.

#### **Joint Stock Company—Act, 1862.**

*Held*, that persons dealing with the directors of Joint Stock Companies, although they must be held to have made themselves acquainted with the provisions of the statutes and articles of association, are entitled to assume that all notices of meetings and notices of resolutions have been properly given. Per Lord President (Inglis): "I hold it to be perfectly clear law that third parties are not bound to inquire, but on the contrary are entitled to presume that everything has been regularly done in the summoning of the meeting of the company in which resolutions are passed. I think any other conclusion upon such a question would be attended with the most monstrous and inexpedient results." 6 June, 1877. *Hecton v. Waverley Hydropathic Company*, 4 S.C., 830.

**Partnership—Joint Adventure—Sale.**

A. and B. entered into a joint adventure for yarn. A. authorized B. to purchase the yarn at a certain price, and B. purchased the yarn at a slightly increased price, in his own name, from L., and granted bills in his own name, without disclosing the joint adventure. B. became bankrupt. In an action by L. against A. *Held* (Lord Mure diss.) that A. was liable to the extent of the price at which he had authorized B. to buy the yarns. Many English cases were cited on both sides. Per Lord President (Inglis): "The fair result of the evidence is that B. was to act as agent for the joint adventure in making the purchase, and I do not think that the circumstance that he agreed to give a farthing more the spindle than he was authorized to give deprives him of the character of agent. If an agent exceeds his instructions, that does not alter the character of the transaction. He may not bind his principal to a greater amount than he was authorized to bind him, but he will not make himself anything but an agent." 8 June, 1877. *Lockhart v. Moodie & Co.*, 4 S.C., 859.

**Ship—Charter Party—Demurrage.**

A ship was chartered to load a cargo of scrap iron, and thence to proceed to G——, or so near thereto as she may safely get. On 10th September she arrived at G——, but the docks were full. On the 12th, the ship was anchored off the entrance of one of the docks, where it was proved that ships were in use to be unloaded of similar cargoes by means of lighters, but there had been no practice as to scrap iron. On the 13th, the master intimated he was ready to discharge; but the discharge did not commence until the 22nd, and was completed on the 28th September, when the vessel had been removed into the docks. *Held*, that demurrage was due from the 14th to the 28th September. Many English cases were cited. Per Lord President (Inglis): "There is no difficulty in the rule of law, which is recognised both here and in England. A vessel, where she undertakes to go to a certain port, does not fulfil her obligation unless she goes either to the appointed place of discharge, or to a usual place of discharge. I am of opinion that the obligation in this case was fulfilled, and that the charterers, though they desired to get the vessel into the railway dock for the purpose of discharging on to trucks, could not reasonably refuse to take delivery where the ship lay, when the result was to cause delay." 19 June, 1877. *Bremner v. Burrell and Son*, 4 S.C., 934.

**Property—Restriction.**

All the feuars in a street held titles containing restrictions that "the houses to be built should all be single or self-contained lodgings." During thirty years, numerous houses had been converted into business offices. *Held*, that the right of the feuars to object had been lost by abandonment. 22 June, 1877. *Fraser v. Downie*, 4 S.C., 942.

**Domicile—Succession.**

A Scotchman entered the civil service of the East India Company in 1841, and continued so until 1875, when he died in Scotland while on furlough. *Held*, that neither the clauses in the Act, 1858, nor the Act of Council, 1865, affected his domicile, which he had acquired before the Acts had passed, and that his domicile was in India at the time of his death. 23 June, 1877. *Wanchope v. Wanchope*, 4 S.C., 945.

**Thellusson Act, 39, and Geo. II., c. 98.**

A trust deed directed the trustees to lay out the residue of the succession in the purchase of lands to be entailed. The trustees did not make the purchase until thirty-four years after the testator's death. *Held*, 1st, that the Thellusson Act applied to the accumulations made after the lapse of twenty-one years from the testator's death; but 2nd (Lord Deas and Lord Rutherford Clerk dissenting), that the heir of entail was entitled to the accumulations and not the trustee's next-of-kin, as he would have been entitled to the rent of the land if it had been purchased. 29 June, 1877. *McKenzie v. McKenzie's Trustees*, 4 S.C., 962.

**Contract—Reparation.**

An action of damages was founded on a missive whereby the defender agreed to give the pursuer a certain salary for the first two years' service, and "at the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased." The pursuer alleged that the defender failed to give implement of the concluding clause: *Held* (Lords Craighill and Shand diss.) that the action was irrelevant, in respect there were in the letter no *termini habiles* out of which a contract of co-partnery could have been formed. Per Lord President (Inglist): "There is no means of making out the *termini* of a contract of co-partnery; there is no endurance specified, no declaration of what shares are to be. None of the essentials of such a contract

re settled in this short sentence. If any man of business was set down to prepare a contract of co-partnery from these materials, he would decline the employment, because the task would be impossible." "A contract which cannot be enforced by specific implement in so far as regards its form and substance is no contract at all, and cannot form the ground of an action of damages." Per Lord Shand: "The well-known language of obligation is used. It may be that unfortunately the Court cannot tie down the defender to any obligation, because the deed is too loosely expressed, but it is clear that the undertaking was given as an obligation, and I think it must be taken to have been the leading consideration which induced the pursuer to enter into the contract. This being so, the pursuer suffers injustice if he has given his services for two years at a low remuneration, and now is to find that the remaining stipulations are not binding." "The law will not compel parties to enter upon, or, in some cases, to keep up, a close and intimate relation against their will, but will give damages for breach of contract. The most common example is an engagement to marry, and the contract of service is no other. So also in partnership the law will not compel specific implement where the co-partnership has not begun, but damages will be given in lieu of implement." (English authorities were cited, especially 1822, *Figes v. Cutler*, 3 Starkie, 139; 1832, *McNeill v. Reid*, 9 Bingham, 68.) July, 1877. *McArthur v. Lawson*, 4 S.C., 1134.

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## Legal Obituary of the Quarter.

(ENGLAND, SCOTLAND, AND IRELAND.)

ASHWORTH, Thomas Baker, Esq., Solicitor, Rochdale, aged 34. Admitted 1868. *Sept.* 30.

BATT, William Forster, Esq., Solicitor, Abergavenny, aged 65. Admitted 1837. *Sept.* 25.

BERKELEY, Thomas, Esq., Solicitor, aged 75. Admitted 1831. *July* 17.

BLEWITT, Reginald James, Esq., formerly Solicitor, of Llantarnam Abbey, Monmouthshire, aged 78. J.P. and D.L. for Monmouthshire; Editor of the *Monmouthshire Merlin*, a Liberal paper, 1829-32; M.P. (Liberal) for Monmouth District Boroughs, 1837-52. *Sept.* 11.

BOODLE, Henry Mitford, Esq., Certificated Conveyancer, aged 76. *Aug.* 3.

BOSANQUET, William Henry P., of Kilmagemogue, Co. Waterford, and of the Inner Temple, Esq., Barrister-at-Law, J.P. for Co. Waterford, aged 73. Called 1836. *Sept.* 29.

BURN, George, Esq., W.S. (Scot.) Admitted 1864. *Sept.* 20.

CAYLEY, George John, of the Inner Temple, Esq., Barrister-at-Law, aged 52. Author of "The Bridle Roads of Spain," &c. Called 1852. *Oct.* 11.

CHALK, Sir James Jell, of the Middle Temple, Knight, Barrister-at-Law, F.S.A., aged 74. Called 1839. Secretary to the Ecclesiastical Commissioners, 1850-71, receiving the honour of knighthood on his resignation. *Sept.* 23.

CHAPMAN, James, Esq., D.C.L. (Ch. Ch., Oxon.), formerly an Advocate of the College of Doctors of Law; J.P. and D.L. for Kent. *July* 3.

CHELMSFORD, The Right Hon. Lord, Hon. D.C.L., Oxon., F.R.S., aged 84. We extract the following particulars of his career from the *Daily News*:—"The late Lord Chelmsford was the youngest of the three sons of Mr. Charles Thesiger, collector of Customs in the Island of St. Vincent, by his wife, Mary Anne, daughter of Mr. Theophilus Williams, and was born in London, 15th July, 1794, consequently he was in his 85th year. At an early age he entered the Royal Navy as a midshipman on board the *Cambrian* frigate, having adopted the profession of his gallant uncle, Captain Sir Frederick Thesiger, R.N., who

as aide-de-camp to Lord Nelson at Copenhagen. At the wish of his parents, his two elder brothers having died young, he changed his profession for that of the law, and was further induced to make the change on the destruction of his paternal property by the great eruption of Mount Souffrière in 1812.

He was called to the bar by the Honourable Society of Gray's Inn in Michaelmas Term, 1818, and went the Home Circuit, of which he ultimately became a leading member, and was made a King's Counsel in 1834. He was an unsuccessful candidate for Newark in February, 1840, but in the following month was elected M.P. for Woodstock, which borough he represented in the House of Commons till 1844, which year he was elected M.P. for Abingdon, and represented that borough till 1852, when he was returned

for Stamford, which he represented in Parliament till his elevation to the peerage. Sir Frederick Pollock having been appointed Lord Chief Baron of the Exchequer in the place of Lord Abinger in 1844, Sir William Follett succeeded him as Attorney-General, when Sir Robert Peel selected Mr. Thesiger for the vacant Solicitor-Generalship. As is customary, he then received the honour of knighthood. In July, 1845, Sir William Follett was compelled to resign his office as Attorney-General on account of his declining health, when Sir Frederick succeeded him as Attorney-General, a post which he filled till the resignation of Sir Robert Peel's Government in July, 1846. On Lord Derby coming into power in February, 1852, Sir Frederick Thesiger again became Attorney-General, which office he held during that short Administration. On Lord Derby again succeeding to power in February, 1858, Sir Frederick became Lord Chancellor, when he was made a Privy Councillor, and on March 1st was raised to the peerage by the style and title of Lord Chelmsford, of Chelmsford, in the county of Essex. He continued the office with the Ministry in June the following year. Lord Derby again succeeded to the Premiership in June, 1866, when Lord Chelmsford resumed the post of Lord High Chancellor, which he held till February, 1868, when he retired from public life, and was succeeded by the present Lord Chancellor, Lord Cairns. The late peer was a fellow of the Royal Society, and an hon. D.C.L. of Oxford. He married, March 9, 1822, Anna Maria, youngest daughter and co-heir of Mr. William Dilling, of Southampton, and niece of Major Peirson, the heroic defender of Jersey, by which lady, who died April 9, 1855, he leaves surviving issue besides three daughters, four sons;

Frederick Augustus (now Lord Chelmsford), C.B., Lieut.-General Commanding Division, and Lieutenant-Governor at the Cape of Good Hope; Colonel Hon. Charles W. Thesiger, late 6th Dragoons, inspecting officer of auxiliary corps; the Hon. Alfred Henry, one of the Lords Justices of the Court of Appeal, and the Hon. Edward Peirson. *Oct.* 5.

COWAN, Lord, lately a Lord of Session and of Justiciary, Scotland, aged 80. The deceased Judge (John Cowan) was born July 6, 1798, at Ayr; was educated at the Ayr Academy and the University of Edinburgh, and called to the Scottish Bar in 1822. He was appointed Sheriff of Kincardineshire in 1848, and held that office until 1851, when he became Solicitor-General for Scotland, and in the same year, on the death of Lord Dundrennan, was raised to the Bench under the title of Lord Cowan. Our esteemed contemporary the *Scottish Law Magazine* thus sums up his character: "One of the ablest feudal and commercial lawyers of his day, Lord Cowan added to an accurate and profound knowledge of law a conscientiousness and force of character which gave great weight and influence to his decisions from the Bench. As a criminal judge, though somewhat severe, Lord Cowan rarely made any mistake in estimating the guilt or innocence of a prisoner; it was indeed a hopeless task for a counsel to endeavour to divert his mind from the main point at issue. In his relations to the Bar, courteous to all, Lord Cowan may be said to have fairly won the hearts of his junior brethren. Doubtless remembering the time when, young and unknown, he had his own way to make, he was never without a word of sympathy and assistance for any young counsel pleading his first cause." Failing health, after twenty-three years' service on the Bench, compelled him to retire from active life in 1874. *Aug.* 1.

CURE, Robert Capel, of Blake Hall, Essex, and of Lincoln's Inn, Esq., Barrister-at-Law, aged 55. M.A., Trin. Coll., Cam.; J.P. and D.L. for Essex. Called 1848. *Sept.* 28.

CUSACK, Finlay W., Esq., M.A., Barrister-at-Law (Irel.) *Oct.* 6.

DANGER, Thomas, Esq., Solicitor, Clerk of the Peace for Bristol, aged 66. Admitted 1836. *Aug.* 20.

DANIEL, Robert, Esq., LL.D., Barrister-at-Law (Irel.) Called 1860. *Aug.* 23.

DAVIES, Edward John Cox, Esq., Solicitor, Newport, aged 54. Admitted 1846. *July* 31.

DICKINSON, Sebastian Stewart, of Brown's Hill, Stroud, and of



the Inner Temple, Esq., Barrister-at-Law, aged 62. Educated at Eton. Called 1839, and practised for a time at Bombay. J.P. and D.L. for Gloucestershire, and Chairman of Quarter Sessions; M.P. (Liberal) for Stroud, 1868-1874; re-elected in 1874, but unseated on petition. *Aug. 24.*

DICKSON, Alexander, Esq., Barrister-at-Law (Irel.) *July 19.*

DICKSON, James David, Esq., Advocate (Scot.) Called 1873. *Sept.*

DOLLING, Robert Holbeche, Kilrea, Co. Derry, and of Magheralin, Co. Down, Esq., Barrister-at-Law (Irel.), aged 68. B.A., Trin. Coll., Cam.; J.P. for Counties Down, Monaghan, and Londonderry, and D.L. for the latter County. Called 1834. *Sept. 28.*

EDISON, John Sibbald, of the Middle Temple, Esq., Barrister-at-Law, aged 74. Called 1831. Author of "A Commentary on Lord Brougham's Character of George III.," "A Commentary on Lord Brougham's Character of Mr. Pitt," and "Observations on the Excellence of the Real Property Law." *Sept. 9.*

EVANS, J. Rice, Esq., Solicitor, Aberayron, aged 24. Admitted 1878. *Oct. 5.*

GISBORNE, Francis, of Holme Hall, Derbyshire, and of the Middle Temple, Esq., Barrister-at-Law, J.P. for Co. Derby, aged 55. B.A. St. Peter's Coll., Camb. Called 1848. *July 7.*

GRANT, John, Esq., Solicitor (Scot.), aged 71. Admitted 1835. *July 24.*

HALL, John, Esq., Barrister-at-Law (Irel.), aged 64. *Aug. 25.*

HARDING, John, Esq., Barrister-at-Law (Irel.) *Aug. 11.*

HENRY, W. J., Esq., Solicitor (Irel.), Town Clerk of Dublin. *Aug. 12.*

HEWLETT, Henry William, Esq., Solicitor, aged 82. Admitted 1819.

HOTSON, Wales Christopher, of Lincoln's Inn, Esq., Barrister-at-Law, M.A., Cambridge, aged 72. Called 1841. *Oct. 19.*

HUME, Matthew Norman MACDONALD, Esq., W. S. (Scot.) Admitted 1815. Father of the present Solicitor-General for Scotland (Mr. J. Hay A. Macdonald). *July 7.*

KAY, Joseph, of the Inner Temple, Esq., Q.C., and a Bencher; Solicitor-General, County Palatine of Durham; and one of the Judges of H.M. Court of Record for the Hundred of Salford, aged 57. M.A., Trin. Coll., Camb.; Author of "The Law relating to Shipmasters and Seamen" (1875). *Oct. 9.*

KEOGH, the Right Hon. William, LL.D., late Judge of the Court of Common Pleas, Ireland, and Bencher of the King's Inns, 1853, aged 60. *Sept.* 28.

LOVETT, Philip William, Esq., Solicitor, Guildford, aged 46. Admitted 1853. *Aug.* 28.

MCDONNELL, Thomas, Esq., B.A., Trin. Coll., Dublin, Q.C. (Irel.) The deceased gentleman, who was "Father of the Irish Bar," was called so long ago as 1816, and took silk in 1837. He was for many years Senior Crown Counsel for the County Down. *Sept.* 25.

MOORE, William Henry, Esq., Solicitor, Liverpool, aged 72. Admitted 1835. *Sept.* 25.

NETHERSOLE, Henry Wordsworth, Esq., Solicitor, aged 35. *Sept.* 24.

PIGOTT, William, Esq., Solicitor (Irel.) Admitted 1838. *Sept.* 24.

PLUMBE, Henry, Esq., Solicitor, Winchcombe, aged 48. Admitted 1852. *Aug.* 5.

PRANCE, Charles Henry, of Lincoln's Inn, Esq., Barrister-at-Law, M.A., Ch. Ch., Oxon. Called 1862. *Aug.* 24.

PRENDERGAST, Harris, of Lincoln's Inn, Esq., Q.C., and a Bencher, B.A., LL.B., Trin. Coll., Camb. Called 1829. *Sept.* 30.

ROSE, Thomas Baily, of Gray's Inn, Esq., Barrister-at-Law, aged 72. Formerly Stipendiary Magistrate for the Staffordshire Potteries. Called 1827. *July* 26.

SAUL, Silas, Esq., formerly Solicitor, Carlisle, aged 75. *July* 14.

SCHOMBERG, Joseph Trigge, of the Inner Temple and Lincoln's Inn, Esq., Q.C., aged 72. Through his mother Amelia, daughter of the late Rev. John Lawrence Brodrick, D.D., he was descended from Alan, first Viscount Midleton, Lord Chancellor of Ireland (1717). Educated at Winchester School. Called to the Bar by the Inner Temple, 1828; migrated in 1864 to Lincoln's Inn, of which he became a Bencher; Recorder of Aldborough, 1845; Q.C., 1866. In 1868 he unsuccessfully contested, as a Liberal, the northern division of Wilts. Author of "The Succinct Law of Tithes, with Commutation Act." *July* 28.

SMITH, William Wyke, Esq., Solicitor to the Metropolitan Board of Works, aged 69. Admitted 1831. *July* 23.

STONE, William, Esq., Solicitor, Tunbridge Wells, aged 70. Admitted 1832. Author of a "Practical Treatise on Benefit Building Societies and Tontine Companies" (1851). *Sept.* 27.

STURDY, Daniel, of the Middle Temple, Esq., Barrister-at-Law, aged 49. Called 1875. *July* 20.

THURLOW, Henry Frederick, of the Inner Temple, Esq., Barrister-at-Law, aged 35. M.A., Ball. Coll., Oxon. Called 1866. The deceased was a great-grand nephew of the celebrated Lord Chancellor Thurlow. *Oct.* 8.

TORR, John Smale, Esq., Solicitor, aged 59. Admitted 1840. *July* 23.

TUCKER, George Rodney, of the Middle Temple, Esq., Student-at-Law, B.A., Trin. Hall., Camb., aged 25. *Aug.* 25.

TUTHILL, Arthur Hendley, Esq., B.A., Trin. Coll., Dublin; Barrister-at-Law (Irel.), aged 27. Called 1875. *Sept.* 1.

WAGSTAFFE, Matthew Mawe, Esq., B.A. (Lond.), Solicitor, Wakefield, aged 36. Admitted 1865. *July* 21.

WHALLEY, George Hammond, of Plas Madoc, Merionethshire, and of Gray's Inn, Esq., Barrister-at-Law, M.P. for Peterborough, aged 65. Mr. Whalley, who was distinguished in Parliament by his unflinching assaults upon the Jesuits and latterly by his support of the Tichborne claimant, was a son of Mr. James Whalley, merchant and banker, of Gloucester. Educated at Univ. Coll., London; called to the Bar, 1839, and went the Oxford Circuit; for some years an Assistant Tithe Commissioner; M.P. (Liberal) for Peterborough from 1859 till his death; he was a J.P. for Denbighshire and Montgomeryshire, and D.L. for the former county. *Oct.* 7.

WHITE, Henry, Esq., Solicitor, Williton, Somerset, aged 72. Admitted 1827. *Sept.* 8.

WOODWARD, Charles, Esq., Solicitor (Irel.) Admitted 1835. *Aug.* 21.

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[We regret that we are unable to fulfil our promise to present our readers with a Memoir of the late Mr. Russell Gurney. The Memoir was duly written by the eminent Queen's Counsel, to whom we referred in our August Number, and had even been set up in type. At the last moment, however, the late Recorder's widow intimated that "the publication of any notice whatever of her late husband would be very painful to her," and to this expression of her wishes we have felt bound to defer.—Ed.]

## Reviews of New Books.

*The Law of Fraud, and the Procedure pertaining to the Redress thereof.* By MELVILLE M. BIGELOW. Boston: Little, Brown, & Co. London: Sampson Low, Marston, Searle, & Rivington. 1877.

Mr. Melville Bigelow, whose work on "The Law of Estoppel" has gained for him a deservedly high position among Transatlantic legal writers, has produced a treatise on the Law of Fraud, which is at once original in its treatment of the subject, and lucid in its exposition, while bearing on its pages evidence of no little care and accuracy. Excluding from the scope of his work the Criminal Law of Fraud, the author has applied himself exclusively to expounding the Law relating to Fraud in its Civil aspects. Even here the field has been further narrowed by confining the Statutory Law concerning Fraud on Creditors and Purchasers to a bare reprint, at the end of the volume, of English, Federal, and State Legislation, with short references to the judicial construction placed upon the language employed. The book is therefore limited to an enunciation of the Common Law doctrine of Fraud in its civil aspects. Mr. Bigelow divides his work into two parts. Part I. treats of the Substantive Law of Fraud; (a.) Actual—under the headings of Deceit, Special Fraud in Pais, Frauds on the Administration of the Law, and Waiver and Confirmation; (b.) Presumptive or Constructive Fraud, comprising Confidential Relations and the like, and Notice. Part II. is devoted to the Adjective Law of Fraud, that is, Procedure and its Incidents. A careful Index adds to the utility of a book which well deserves to find a place in the library of the English, as well as of the American, lawyer.

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*A Concise Treatise on the Practice and Procedure in Chancery Actions.* By SYDNEY PEEL, of the Middle Temple, Esq., Barrister-at-Law. Stevens & Sons. 1878.

Within the compass of a couple of hundred pages, Mr. Peel has provided a clearly-written and methodically-arranged statement of the various proceedings in the course of Chancery actions. The numerous decisions on points of practice since

the Judicature Acts came into operation down to Easter of the present year appear to have been carefully worked in, and a few new forms have been added to, or substituted for, those given in the Schedule to the Judicature Act of 1875. In the Table of Cases, the system—which we have ourselves always advocated—of giving a reference to every report of each case has been adopted, and a marginal analysis and full Index smooth the path of all wishing to consult the book on any particular point. The practitioner will in most cases probably prefer Griffith's, Wilson's, or some of the other larger books of practice, but the student will find Mr. Peel's treatise a valuable aid in getting up the procedure of the Chancery Division.

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*A Treatise upon the Law of Principal and Agent in Contract and Tort.* By WILLIAM EVANS, B.A., Oxon., and of the Inner Temple, Esq., Barrister-at-Law. W. Maxwell & Son. 1878.

Between the comprehensiveness of Mr. Justice Story's work, which comprises not only the English and American but also the Civil Law of Agency, and the limited nature of the Treatises of Paley and Russell, which are almost entirely restricted to Mercantile Agency, it seemed to Mr. Evans that there was room for a book which, while confined to the English law of agency, should give a general view of it in all its various ramifications. The volume is divided into twenty-seven chapters, each subdivided into sections, and grouped in three books which treat respectively—(1) "Of the Contract Generally, its Origin and Dissolution"; (2) "Of the Authority Conferred, its Nature, Extent, and Execution"; and (3) "Of the Rights, Duties, and Liabilities arising out of the Contract." Mr. Evans has evidently expended much intelligent labour in the accumulation of his materials, which are clearly arranged and expressed in lucid language. No statement of any importance occurs unsupported by a reference to some decided case or other accepted authority, and, to a certain extent, the author has set forth the Principles of Agency in a digested form. The last chapter in Mr. Evans's book is devoted to a careful discussion of a subject of great and growing importance—the Liability of Employers for injury caused by negligence of fellow workmen; and a useful digest is offered of the rules deducible from the latest decided cases. In a second edition we should suggest the insertion of a marginal analysis, the absence of which detracts from the facility of reference in a

work so likely to be consulted under pressure. We should have preferred to see the author attempt, and successfully accomplish, the task—the advantages of which he acknowledges—of casting the whole of our Law of Agency into the form of a Digest or Code. But in its present shape the work cannot fail to be most useful to all, whether Practitioners or Students, who have occasion to look up the English Law on this important subject.

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*Under the Red Ensign.* By THOMAS GRAY. Simpkin, Marshall & Co.; Kent & Co.; Pewtress & Co. 1878.

The extensive knowledge which the author of this handy book for the Merchant Service has derived from his official relation with the Board of Trade enables him to speak with great weight on all subjects connected with life under the "Red Ensign." Mr. Gray takes up a boy at the age when the "salt-water fever" has got possession of him, advises the parents or guardians in such a case to let him go, and then proceeds to explain clearly the various steps which should be taken to give the boy the chance of becoming a good officer, and, in time, a good captain. Of the so-called "dangers of the sea," Mr. Gray has a very small opinion, and the statistics which he prints concerning the annual casualties in some of the best known channel and ocean lines certainly make out a very strong case in favour of his view. It is, in truth, the sailor's own conduct when ashore which is likely to prove his greatest danger. A series of Appendices furnish much indispensable information, legal and other, respecting the Rights of Seamen as regards unseaworthiness of ship, Forms of Apprentices' Indentures for England and Scotland, Examinations, and, in fact, everything that can be thought of to smooth the way for taking a good place in the far-famed Mercantile Navy of Great Britain.

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*The Law relating to Solicitors of the Supreme Court of Judicature.* By A. CORDERY, of the Inner Temple, Esq., Barrister-at-Law. Stevens and Sons, 1878.

Solicitors, we imagine, and even laymen who have been, are, or expect to be, in the position of clients, will be grateful to Mr. Cordery for this useful compendium of the law regulating the various rights, duties, and obligations arising from the peculiar relation of solicitor and client. Solicitors might be

supposed to be well up in this special branch of the law, but, as a matter of fact, we believe that a large number of them are by no means perfectly *au courant* with its many details, and to such the present volume will readily supply the information which they might otherwise have to seek out for themselves in the pages of various other works. The recent very curious and, we believe, unprecedented case of *Maxwell-Lyte v. Wickham*, which so well illustrates one of the disabilities of the solicitor with respect to his client, has been decided since Mr. Cordery's volume went to press. In this case, as will be in the recollection of our readers, the client being anxious to make a gift to his solicitor of a share in the profits of certain inventions, in the bringing out of which the defendant had rendered much friendly assistance, brought an action in the Chancery Division and obtained from Vice-Chancellor Malins a judicial decision that, notwithstanding the relation of solicitor and client existing between the parties, the plaintiff might make the intended gift to the defendant. The law of costs has an especial interest for the solicitor, and Mr. Cordery has done well to cite, in considerable detail, those decided cases which govern the question of costs as between solicitor and client, while omitting it as between party and party, the latter being in reality a branch of general law.

In an Appendix will be found all the unrepealed sections of the various Solicitors' Acts, such of the Regulations of 1875 as are still in force, and the New Regulations made by the Incorporated Law Society, and by certain of the Judges, in November and December, 1877: together with the direction as to notices for admission issued from the Petty Bag Office in January last.

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*The Common Form Practice of the High Court of Justice in Granting Probates and Administrations.* By H. C. COOTE, F.S.A., late Proctor in Doctor's Commons. Eighth Edition. Butterworths. 1878.

The eighth edition of so well-known a work requires only to be made known, to find its due place on the shelves of the practitioner. We observe that Mr. Coote takes occasion, in his advertisement to the new edition, to explain what some readers of the previous one seem not to have understood, viz., that in retaining the unrepealed forms annexed to the Rules of 1862, he never intended them to be employed in their actual shape for

existing Common Form Practice. With this warning, the present edition cannot but be found a most useful companion for the constantly recurring needs of the branch of practice with which it deals.

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*The Statutes ; Revised Edition.* Vol. XV. (1866-8), and Supplements. Eyre & Spottiswoode. 1878.

"*Exegi Monumentum*," may now be the ejaculation of every member of the Commission whose valuable labours we have from time to time noticed, and which are completed with the volume now before us. To the Constitutional Lawyer this concluding volume is most interesting, from the fact of its containing, by way of supplement, besides other later landmarks of our history, careful reprints and translations of "Magna Carta," the "Carta de Libertatibus Foreste," as confirmed by Edward I. a. r. 25. This is, we think, what has lately been secured, under the form of an "Inspeximus," for the library of Sir Robert Taylor's Institution at Oxford, so far as the librarian's description in a recent number of *Notes and Queries* enables us to judge. We must say that we regret the quaint archaism of the English translation adopted by the Commissioners for the Revised Statutes, who print "Duke of Guyan," if anything rather suggestive of British Guiana, as the rendering of "Aquitania" in the original text. But this is a criticism of rather minute textual lore, and in no wise hinders us from heartily recommending the entire series alike to the practitioner, to whom it is well-nigh indispensable, and to the Constitutional lawyer and historian. Our chief regret in penning these words is, that we are taking leave of pleasant and useful guides through many a century of English History.

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*A Concise Treatise on Private International Jurisprudence.* By J. ALDERSON FOOTE, Barrister-at-Law. Stevens and Haynes. 1878.

The length of time which has elapsed since the publication of Mr. Westlake's classical work on Private International Law, affords a fair opening for such an undertaking as Mr. Foote's handbook of Foreign and Domestic Law. We are glad to see the Whewell scholarships in International Law bearing such good fruit, and can only wish that similar foundations existed in the University which Albericus Gentilis adorned. Mr.



Foote has evidently borne closely in mind the needs of students of Jurisprudence as well as those of the practitioner. For both, the fact that his work is almost entirely one of Case-law will commend it as one useful alike in Chambers and in Court. From such a sphere of usefulness the absence of scientific jurisprudence is not likely to detract. As a rule, Mr. Foote only discusses cases, not principles, and when he does enter upon the more theoretical side of his subject we find ourselves somewhat sharply at variance with the views which he appears to hold. We had marked several instances of this divergence between us, but space and time alike warn us to name but one or two of the more salient points. On Diplomatic Immunity Mr. Foote appears to us to use language which is the exact opposite of the true statement, resting the immunity upon the "fiction of extra-territoriality," instead of showing how that fiction has been invented to account for the immunity enjoyed by Ambassadors as the representatives of a foreign Sovereignty. The word "ex-territoriality" was doubtless unknown in the reign of Richard III., and yet it was even then laid down by the Parliament of England that "Ambassadors should be protected like Princes." And the distinction which does require to be drawn is not, as Mr. Foote would have it, between the immunity of the Sovereign and that of the Ambassador, but, as General Halleck puts it, "between the inviolability of the public minister and the legal fiction of his *ex-territoriality*." We conceive that Mr. Foote's language on this point is of a nature to confuse the student. On the questions connected with slavery, which have in recent times roused keen discussion in both our Houses of Parliament, we should certainly advise the student to read the careful juridical statements of Sir Travers Twiss, in the pages of this Review, and the earnest words of the late Sir Edward Creasy. From Mr. Foote he would only learn that once such a practice "*placuit gentibus*." That we may now "say with honest pride *displicet gentibus*" (with the exception, seemingly, of Portugal and Holland), he must learn from the late Professor of Jurisprudence in the Inns of Court. That "the universal voice of Christendom has repudiated this practice as a relic of barbarism, *moribus qui nunc frequentantur alienum*," he must learn from the former Regius Professor of Civil Law in the University of Oxford. These points on which we differ *toto cælo* from Mr. Foote, are purely Theoretical, and do not detract from the general utility of his book as a convenient source of reference on the principal

questions arising in daily practice on matters of Foreign and Domestic law. We observe that Mr. Foote's treatise incidentally confirms the views expressed elsewhere in our present number regarding the dilatoriness of the authorised Law Reports. At p. 69, the case of *Niboyet v. Niboyet* is cited, with the ominous addition "not yet reported," though it was decided in May, and Mr. Foote's preface is dated October; and *Gomez v. Eames* is cited, on p. 20, from the *Times* of 9th and 10th July, that case also being marked "not yet reported."

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*The Student's Leading Cases* in Constitutional Law, Common Law, Conveyancing and Equity, Probate, Divorce, Bankruptcy, and Criminal Law. By JOHN F. HAYNES, LL.D. Stevens and Sons. 1878.

There are Students' books and Students' books. The fact that a book is professedly written *in usum juventutis* is quite compatible with its being one of great merit and originality, capable of materially aiding the investigations of those who are indeed students and seek for honours, without in any way detracting from the thoroughness of their work. Such publications are rare, while the "cram" book for struggling pass-men multiplies day by day. Dr. Haynes has already provided for this latter class "The Student's Statutes" and "The Student's Guide to Probate and Divorce," and we doubt not they will thankfully welcome this additional key to superficial knowledge. Having regard to the wide field which the compiler covers in this volume, the statements of the various cases are fairly full and clear, and many of the notes are good. But since, in his note to *Calvin's* case, Dr. Haynes has mentioned the Naturalization Act, 1870, we are surprised that he should have omitted to point out how that Act has completely altered the status of Aliens and naturalized subjects, has created the new persona of a "statutory alien," and, by upsetting the ancient maxim *nemo patriam in qua natus est exuere, aut ligeantiae debitum ejurare, potest*, has rendered most of the learning as to allegiance and aliens in *Calvin's* case a matter of purely historical interest. Many of the cases have their date placed at the head, and it would have been well had this very convenient practice been adhered to throughout. Probably in a future edition Dr. Haynes may see his way to these and some other improvements.

*A Selection of Precedents of Pleading under the Judicature Acts in the Common Law Divisions*, with Notes and an Introductory Treatise. By JOHN CUNNINGHAM and M. W. MATTINSON, Esqrs., Barristers-at-Law. Stevens and Haynes. 1878.

Messrs. Cunningham and Mattinson come forward opportunely to take up ground which, since the passing of the Judicature Acts, seemed to be awaiting the first occupant. A work which, in the compass of a single portable volume, contains a brief Treatise on the Principles and Rules of Pleading, and a carefully annotated body of Forms which have to a great extent gone through the entirely separate sifting processes of Chambers Court, and Judges' Chambers, cannot fail to be a most useful companion in the Practitioner's daily routine. And readiness of reference, clearly one of the desiderata in such a book, has been studied by the authors in their adoption of the alphabetical arrangement for the Precedents. We presume that it was their study of conciseness in the number of headings of Precedents which has caused the authors to omit some cross-references which might have been expected; otherwise under "Medical Man" (p. 433), we should have thought a reference to "Penalty" would have been desirable. On the whole, Messrs. Cunningham and Mattinson show by their present volume that they appreciate the desire expressed by Lord Justice James in *Davy v. Garrett*, that the Legal Profession should not succumb to the devices of the "Sons of Zeruiah."

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#### SMALLER BOOKS AND PAMPHLETS.

*The Analytical Digest of Cases decided in the Supreme Courts in Scotland, and, on Appeal, by the House of Lords* (Edinburgh, T. & T. Clark, 1878), prepared by Messrs. A. E. Henderson, D. Gillespie, and H. Johnston, Advocates, promises to be a work of considerable practical value to all who wish to master the decided points in cases that have arisen in the Scotch Courts, and been carried up to the House of Lords within the past ten years. The analysis made of each subject of law, as, e.g., Bankruptcy, pp. 57-8, is very full, and the cases follow in the sequence of the analytical divisions. The first instalment extends as far as the heading Fraud, and breaks off somewhat violently, it must be admitted, in the middle of a sentence in the digest of a case thereunder, a mode of publication which,

we should think, can scarcely be other than tantalising to practitioners.

In *A Short View of the History and Consequences of Primogeniture in England* (Cambridge: Deighton, Bell & Co. London: George Bell & Sons, 1878), Mr. C. J. Cooper, M.A., LL.D., Barrister-at-Law, weighs carefully the various aspects of an important question, carrying its history down from Anglo-Saxon times, through Glanville and Bracton to the present day, and indicating an opinion that the principle of primogeniture might be "stripped of much of its present influence" by being removed from its "distinguished place in our Law of Inheritance." But "to give England a *régime* of small ownership" is, in Mr. Cooper's view, "almost impossible," and he is careful to point out that it is against "settlements" that the "shafts of many of the most intelligent assailants of primogeniture are now aimed." Of the general practice of settlements, Mr. Cooper does not think the public mind has as yet taken a cool and intelligent survey, and he is of opinion that it is "not yet prepared to submit to interference in this direction with a good grace."

*Particulars of Conditions of Sale* (Published for the Incorporated Law Society of Liverpool), will be found very useful as furnishing a common form of sale, brought out under the careful supervision of the Liverpool Law Society, and settled by some of the most eminent conveyancing Counsel of the local Bar. The conditions are, generally speaking, favourable to the purchaser; but they are also framed in such a manner as to protect the vendor from any merely vexatious expenditure which the purchaser may have caused him to incur. The whole spirit of the Liverpool Conditions of Sale is equitable, and their application to a wider than local sphere would, we believe, be attended with excellent practical results.

The object of Mr. Walter Robinson, Barrister-at-Law, in his pamphlet on *The Straits of the Dardanelles and the Bosphorus* (W. Ridgway, 1878), appears to be to show that under the general principles of International Law, apart from Treaties, "the straits in question are natural and free thoroughfares open alike to the merchant vessels and the ships of war of all countries for the purpose of ingress to and egress from the Black Sea." But the question as to ships of war is, under the circumstances, just one of those not to be settled "apart from treaties," and this consideration creates a difficulty *in limine* for the acceptance of Mr. Robinson's view.

Mr. Alexander Oliver, of the New South Wales Bar, in his *Collection of Real Estates Acts* (Sydney, 1877. London: Trübner), provides both the "professional and non-professional inquirer" with a book in which he hopes—not, we believe, unfairly—that he has facilitated the "tedious and often difficult task of finding, amidst a mass of sections, the particular enactment sought for." Mr. Oliver further pleads for the creation of a "permanent College or Commission of Jurists" for his Colony, whose work he would fain have to be the presentation to the local Parliament, from time to time, of "well-designed and carefully-prepared groups of Consolidation Acts" covering the entire domain over which the Statute Law ought to range. This is a comprehensive scheme not very dissimilar to that of the work advocated in this country by Sir Henry Thring, and taken in hand by the Statute Law Revision Commissioners.

We have also received the second volume of the *Digest of Civil Procedure* (Allahabad, 1877. London: Stevens and Sons), in which Mr. Knox carries on his useful labours to completion. The concluding portion covers the important subjects of Evidence, Limitation, and Contracts, and comprises the Civil Court Act, the Specific Relief Act, 1877, &c. The pagination adopted by Mr. Knox is continuous throughout, but the index to each volume is complete in itself.

The *Report of the Antwerp Conference* of the Association for the Reform and Codification of the Law of Nations contains, amongst other interesting matter, a *précis* of the work of the Committee which sat on General Average, under the presidency of Sir Travers Twiss and Lord O'Hagan. Looking at the Report as an account of discussions on questions of considerable importance and affecting very powerful interests, we must say that it appears to us not yet to rise to the literary level which it ought to have attained. And we think that a good critical narrative of the proceedings, similar in kind to that which appeared in our own pages on the occasion of the foundation Conference at Brussels (*Law Magazine and Review*, December, 1873) would be of greater practical utility and of wider interest than the fragmentary reprints now given of papers, most of which have already seen the light elsewhere.

*The Student's Guide to the Bar*, by Walter W. R. Ball, M.A. (Macmillan, 1878), is a useful endeavour to give, within the compass of a "Primer," an account of the principal points which need setting before all who may think of adopting the Bar as a

profession. Mr. Ball is not devoid of a touch of quiet sarcasm in his detail of some of the time-honoured institutions connected with the four Inns. The "eating of dinners," for instance, is characterised as a "survival;" and some of the eccentricities which pervade the allowance of exemptions from portions of the examinations for the Bar, also receive notice. Why a student who has passed the examination for a specified degree, but not yet taken it, should lose the benefit of the examination which he has nevertheless passed, seems a mystery that it would be hopeless to try and solve.

In these days of many a bubble company, Mr. F. B. Palmer, who has already made the subject of companies his own, has acquired an additional title to the gratitude of investors by providing them with a clear and concise *Shareholders' and Directors' Legal Companion* (Stevens and Sons, 1878). This handy little book is full of forms for all sorts of contingencies, references to the Companies Acts, 1862 and 1867, and information on most of the varied points of law which are at different times liable to arise in regard to the position of shareholders.

*A Summary of the Law of Companies* (Stevens & Haynes, 1878), by T. Eustace Smith, is the result of a practical acquaintance with the difficulty experienced by Articled Clerks and Law students in mastering the principles of this important branch of Law. Numerous marginal notes and a full Index render Mr. Eustace Smith's book easy for the student's use, and constant reference is made to the sections of the Acts of 1862 and 1867.

In the Easter number of the *Bar Examination Journal* (Stevens & Haynes, 1878), Messrs. Tyssen and Edwards carry on a work for which they, no doubt, receive the grateful thanks of many a student. Besides the Questions set at the Easter Examination and the Solutions furnished by the Editors, the student's attention is directed to the Legislation of the year 1877, some of which is textually cited and commented upon, especially 40 & 41 Vict., caps. 33, 34, and 39, each of which is criticised in some detail.

Mr. W. P. Thompson, C.E., has brought out a Third Edition, revised, of a useful *Handbook of Patent Law of all Countries* (London, Stevens & Sons; New York, Van Nostrand, 1878). The information which it contains is clearly, though of necessity, briefly stated.

In an *Epitome of Fearn on Contingent Remainders* (Stevens & Sons, 1878), the convenience of the student has been, we

should think successfully, cared for. The compiler provides a short analysis of each chapter, a tabular statement of the divisions of estates, and by the use of various types, separates the doctrinal from the illustrative or critical portions of his author.

Mr. W. A. Copinger, so well-known for his work on Title Deeds, was eminently calculated to assist the practitioner in unravelling the perplexities often surrounding the question of the due Stamping of Deeds set out in Abstracts laid before Counsel. His *Tables of Stamp Duties, from 1815 to 1878* (Stevens & Haynes, 1878), have already been tested in Chambers, and being now published, will materially lighten the labours of the profession in a tedious department, yet one requiring great care.

*The York-Antwerp Rules of General Average*, as finally agreed to by a meeting at the Cannon Street Hotel, under the presidency of Sir Travers Twiss, May 3rd, 1878, are now published by the Central Committee, in order to give them the widest possible circulation among shipowners and insurers before the 1st January, 1879, the date when the firms and associations which have accepted them, intend putting them in force. It would appear that Lloyd's, and the London Salvage and Marine Insurance Companies still stand aloof.

Chambers's *Index of Next of Kin*, compiled by Edward Preston, Fourth Edition (Allen, Reeves and Turner, 1878), contains, we understand, more than ten thousand names over and above those embraced in the previous edition. Many of the names thus inserted are from recent advertisements. It would not be difficult to bring out a Romance of the Next of Kin, equal in interest to any of the most startling tales of modern fiction. But Mr. Preston only gives facts and names, and both are occasionally not a little remarkable.

Mr. J. A. Shearwood publishes a volume likely to be of considerable use to the student, a *Concise Abridgment of the Law of Real Property* (Stevens and Sons, 1878), in which, by an adaptation of various types, and the provision of a Tabular Analysis, as well as by the use of clear and simple language, he sets out the important subject with which he deals in a brief but satisfactory manner.

The importance of Real Property Law is witnessed to by the publication of yet another work, that of Mr. H. Greenwood, on *Recent Real Property Statutes from 1874 to 1877* (Stevens and Sons, 1878), in which the author's object is to afford a clue to

recent legislation whether by way of innovation or amendment. The principal sections of the various Acts printed are carefully annotated, and the volume is a very convenient one for reference as the needs of the practitioner may arise.

Mr. Edmund Fuller Griffin, Barrister-at-Law, adds to the utility of the *Indian Jurist* by publishing for the first time an *Indian Jurist Digest* (Stevens and Haynes, 1878), embracing all the Home and Presidency Cases cited in the first volume of the *Jurist*, for 1877. We notice a certain diversity of orthographies, which we presume to be due to the idiosyncrasies of the various Presidency Courts. Thus on p. 51, we have a "Mirassi village," cited from a judgment of the Madras High Court, and on p. 54, "Mirasi lands" from a Bombay judgment. For one diversity, on p. 50, the printers appear to be answerable, where by transposition "Uraima" has been turned into "Uriama" in a judgment of the Privy Council. So far as we have been able to test it, the Digest prepared by Mr. Griffin seems to be well adapted to the convenience of the profession, and may be recommended to all counsel engaged in Indian cases. We think it might have been well to have inserted a cross reference under the head "Puttah," or "Puttahdar," which does not appear at all, to the "Miras" case of Pakiri Mahammed Saib v. Terumala Charriar.

Our friend, M. Clunet, the able Editor of the *Journal de Droit International Privé*, sends us a very interesting essay (*Questions de Droit Relatives à l'Exposition Universelle Internationale de 1878*. Paris: Marchal-Billard, 1878) on some practical questions in International Law, which have been raised during the Paris Exhibition. At the late hour at which this Essay reaches us, we are unable to do more than call the attention of our readers to a work combining in a singularly felicitous manner both Theory and Practice, and giving fresh evidence of its author's wide research in the field of International Jurisprudence. We must reserve for a future occasion any discussion of the various points on which we differ from the learned author, contenting ourselves in the meanwhile with commending his work to the careful perusal of members of the Legal Profession at home as well as on the Continent.

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## Quarterly Notes.

THE Incorporated Council of Law Reporting for England and Wales are perhaps not aware of the growing dissatisfaction in the Profession with the management and condition of their Reports. The Profession have a right to expect very much from the Council: they have the privileges of incorporation, with no bad debts or borrowed capital; no agents, rent, rates, or taxes to pay; ample funds to secure the best reporters; a practical monopoly of the best means of reporting; and judicial revision at their pleasure for every judgment which they report. The prospectus of the Society in 1866 announced that each decision would be published within a month of its date: four months, often many more, now frequently intervene. We may instance *Allhusen v. Labouchere*, heard before the Court of Appeal on August 6th. The chief precedent to be cited was *Fisher v. Owen*, heard on April 3rd, but still unreported in the Law Reports by August, although published long ago in the *Law Times*, *Weekly Reporter*, and elsewhere. A report has since appeared in the September number, five months after date. It would seem, too, that on any rumour of an intended appeal, the report of the trial in the Court of First Instance is put aside to wait, so that the two trials may be reported together. Nothing is gained to the Profession by this junction, and the original report is seriously delayed when (as is the case in other than interlocutory matters) twelve months are allowed for an appeal. Of course, sometimes no appeal is brought after all, e.g., *Williamson v. Barbour*; and then the judgment, in that case a most important one, by the Master of the Rolls, universally valued at the time, is altogether omitted. Whether the delay arises in respect of the original determination to report, or in the reporting, or in the publishing, those who have already subscribed to the Law Reports are put to the expense of subscribing to other reports that they may be able to cite the most recent and relevant cases. Occasionally the appearance of a case in the Law Reports would seem only to be due to the *consensus* of all the reporters for other publications in recording it. It is, too, an idle form of reporting which, as at pages 305 and 533 of the 16th volume of the Equity Series, omits all arguments, and caps a dry list of Counsel's names (or sometimes of cases cited) with a judgment, which is a mere transcript from the short-hand writer's notes, whilst the value of any report is not much heightened even by the Judge's revision several months after delivery.

Meanwhile the "Weekly Notes" are practically useless as a stop-gap, whilst in their present form, for the Council are most anxious, for some unassigned reason, according to their prospectus and reports, that these notes should not be made available for citation. They may certainly be congratulated on their negative success. The number of this publication, issued on the 10th of August, contained the following:—"From Ch. Div. *In re Hay. Farrow v. Wilson.* July 31. Order refused by Hall, V.C., made." As the case had never been previously alluded to in the Reports or Weekly Notes in any way, the only information gained is that an unreported judgment, on some unmentioned point, has been reversed!

At least one judge has commented on the frequent absence from his Court of any reporter for the Law Reports. There is too, we think, fair ground for complaint as to a general deterioration in method and matter, a report often appearing to be an ill-digested combination of the counsel's brief, the short-hand notes, and the report of the case elsewhere. Long cases of mere evidence, in which no new or important principle is established, and which depend entirely on their own singular circumstances, are reported with most elaborate details: *Plimpton v. Malcolmson* and *Dowling v. Pontypool, &c.*, *Railway Company*, may be taken as examples.

These are some of the defects for which a speedy remedy is required. It might perhaps be found, we venture to think, in some such scheme as the following:—Let there be appointed an auxiliary working Council of younger and practical men, who will see to the above and many other things, of which it is perhaps too much to expect notice from a body of eminent Queen's Counsel and two famous Solicitors. Let there also be appointed two or more sub-editors, whose practice will allow of continuous attention to their duties, and not such an intermittent discharge of them as we should imagine can alone be possible by two busy Queen's Counsel. We might almost suggest that a "binding editor" be also appointed, whose duty it should be to see that the work entrusted to the "Binders to the Council" was executed with despatch, and in actual uniformity with the "office pattern." It is very necessary that attention be paid to punctuality and to the diligent reporting of well chosen cases. The Indices should be issued simultaneously with the completion of the volumes. If the Weekly Notes continue to notice any decisions of the Courts, they should be made of more real use, by changing the style of their reports, and adding to them a yearly index of subjects, and not

only of names as at present. Any point of practice or otherwise, if deserving a report at all, should be readily accessible afterwards. The usage might be restored of selling the reports by divisions and parts separately, e.g., Appeal cases, two guineas; Chancery Division, three guineas; and Common Law Division, three guineas, with parts in proportion. If these suggestions, or some of them, were adopted, it would probably be found that an increase in the number of subscribers would soon enable the Council to fulfil the hope which was originally held out to the Profession, of a reduction in the annual price.

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Count Saffi, himself once an exile on British soil, and during that exile the occupant of an Oxford chair, seemed pointed out by the fitness of things as one who should add yet another stone to the cairn which Italy and England have combined to raise in memory of ALBERIGO GENTILI. At once historical, philosophical, and critical, Count Saffi's work\* addresses itself to a many-sided public, and to an audience wider than that which listened to his course of lectures at the Athenæum of Bologna, the origin of his present interesting volume. In his pages we see Rome the juridical as well as theological, "*caput mundi*" of Western Europe, to which all looked up from Boëthius to Thomas Aquinas, as the giver of laws, of speech, of civilization, the Civil Amphictyony of Western Christendom. By degrees, out of the new nationalities which are formed, and the relations necessarily arising between them, there springs, in concert with Roman legal tradition, a new law of nations, the institutes of the new European Commonwealth. But Rome, considered in its Ecclesiastico-Political aspect, becomes a reactionary factor. When the New Learning fills Europe with fresh life, and makes its borders overflow with eager, stirring Thought—that life and that Thought are at once on the side of Liberty, and against Rome. Gentili, the thinker, the jurist, the reformer, is with Liberty, against Rome. Hence his exile; and hence his best work for Humanity and Jurisprudence. It must be admitted that Gentili was not consistent throughout his chequered career. Had it been less chequered he would probably have been more consistent. But should we, in that case, have inherited his greatest gifts to Western Jurisprudence?

\* Di Alberigo Gentili e del Diritto delle Genti. Letture di Aurelio Saffi nell'Ateneo Bolognese. Bologna, Zanichelli, 1878.

Probably not, so we may as well record gratefully the good work which Gentili did in his day, and be thankful that it has lasted, and that the seed which he sowed has taken root in all lands where Western culture and Western law prevail. The Old and the New World seem to meet when we recall the fact that it is to a former Triumvir of Rome that our thanks are due for setting these thoughts before us in flowing language which we can here but faintly reproduce, and for whose full enjoyment our readers must be referred to Count Saffi's own eloquent pages.

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British India would appear to be a very paradise for money-lenders, at least in their dealings with the ryots. When we read of a man who borrowed seventeen rupees and a "maund" of grain twenty years ago, and who has in the interval paid for this accommodation no less than five hundred and sixty-seven rupees, with bonds for other three hundred and seventy-five rupees still outstanding, we incline to fear that doubts may spring up whether it be worth while paying so high a price for the title of subject of the Empress of India. Part of these preposterous sums is made up, we are informed, of charges incurred through the ryot's inability to attend personally at distant Courts. Cannot the number of the Courts be increased, or would it not be possible for the cognisant magistrates to go "*in itinere*" through their districts, to avoid as much as possible giving cause for such imposition? Last, but not least, might not Sir James Stephen's Insolvency Bill, which is said to have been misunderstood, like so many good things that are condemned simply on account of their novelty of principle, be taken out of its official pigeon-hole, and dusted, and applied to the present emergency?

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University Reform seems to be progressing but languidly, whether at the old English Universities or at Trinity College, Dublin. It is to be feared that not a few of the College authorities at Oxford and Cambridge look upon the Royal Commission as a bore, which obliges them to devise some scheme—good, bad, or indifferent—which they may call their Collegiate plan of reform, simply to play it off against the Commission, and not from any deep-seated conviction of the need for some reform, still less as the carefully-considered result of their corporate deliberations. We do not as yet see any signs of such thoughtful weighing of important questions of University extension and discipline as was exhibited by the Collegiate and University

authorities at Oxford on the occasion of the Royal Commission of 1852, and which took a shape of permanent utility in the volume containing the "Report and Evidence upon the Recommendations of Her Majesty's Commissioners," presented to the Board of Heads of Houses and Proctors, December 1, 1853 (Oxford: University Press. 1853). With much that is said in the Report so published we are unable to agree, and the objections made to several of the reforms recommended by the Commissioners have vanished before the practical carrying out of the suggested alterations. But the volume as a whole is satisfactory evidence of the keen interest taken in the general question of reform, even by those who were opposed to the recommendations of the Commissioners, and who thought that the University and Collegiate authorities had received scant measure of courtesy from Her Majesty's representatives. We should like to see even the interest necessary for a sharp opposition manifested on the present occasion. Several of the communications published in this volume deserve to be re-read at the present moment, both on account of the subjects treated, and of the eminence of the writers. We have noticed with special interest a letter on Law Studies at Oxford, by the late Sir John Taylor Coleridge, who was so felicitously described in the memoir furnished to our pages by Sir Laurence Peel, as "in the world, of the world, moving with the world, not spoiled by the world." Mr. Justice Coleridge advocated a course substantially identical with that which we have ourselves urged—viz., the strengthening of the Law Professoriate at Oxford, for the purpose of giving a really wide and sound knowledge of the Principles of Law at the University. "You must not expect," said Sir John Coleridge, "to make complete lawyers, ready for the Courts of Justice, by your unaided Lectures and Lessons; this is as certain in regard to the Law as it is in regard to Medicine, and for much the same obvious reasons. But I think you may give, even to students intended for professional practice, such an amount of elementary legal and cognate information as will be found extremely useful to them when they enter on their directly professional course, and which will be absolutely invaluable to them in their after professional practice, and support and adorn them in their career, however far they may advance in it. . . . Such an elementary course as I speak of should comprise instruction in the Roman Law and the principles of our own Municipal Law, Civil and Criminal; it should be imparted in the Pupil room, book in hand, and in Professorial Lectures, *which should be catechetical,*

*as well as general and popular.\** . . This sort of education, in my own day, could be had nowhere in England, neither at the University nor in London. . . I feel very sure that a course of *this* sort, so far from being thought to delay the young lawyer in *his* progress, would have the effect of removing an objection which many Utilitarians now have to an Academical education, and therefore be likely to attract young men intended for lawyers to *the* University. . . There are some branches of Law which are *so* made up of principle, and some not very numerous historic or *antiquarian* precedents, that even for the lawyer they may be as *thoroughly* learnt, or nearly so, at the University as elsewhere.

. . I consider, however, that what I propose will not have a fair chance unless it be made *compulsory on all*. . . I am sure I *shall* not be thought to make any reflection personally on the distinguished persons who now fill the legal chairs at Oxford when I say that their position as teachers must be very unsatisfactory to them, because it is very unfruitful to the University. As *things* have been, it could scarcely be otherwise; let Oxford be necessarily to all a School of Elementary Roman and English Law, there would be a constant, a gratifying, even an exciting call on them, which I am sure would be satisfactorily answered.

. . I confess I think it of great importance to attract to the Universities those who are to be lawyers. It would be absurd to deny, in the face of such splendid instances, the possibility of men becoming not only accurate but splendid Lawyers without an Academical education; and certainly men may, perhaps even earlier, without it become astute, money-making practitioners; but I am inclined to think, and I judge from a pretty long experience, that the former are exceptional cases—cases of men who are *so* gifted that they overcome every disadvantage, and the latter are a class who do us no honour, and may be left to themselves. For the interests of the Profession at large (and therein, we should always remember, necessarily for the benefit of the Public), it is most desirable that men should come to the Law with all the training and mental discipline and accomplishment and associations which the Academical course alone can give. And speaking of the generality of men, I am sure they succeed best, and do the Public most service, while the most eminent men always add by it a grace and perfection to their excellence." We refrain from adding anything of our own to the "grace" and "perfection" of the views so clearly stated by such an eminent member alike of the University of Oxford and of the Legal Profession.

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\* The italics here are our own; elsewhere they are those of Sir John Coleridge.

The cry for good and cheap Justice is being echoed in Egypt, where the establishment of the International Courts has worked so well as to make those who did not come within the jurisdiction of those Tribunals manifest their desire to be brought within it. There was probably never any reason to doubt that the native-born subjects of the Khedive would welcome a strong and impartial Administration of Justice as readily in conflicts among themselves, as between themselves and Europeans. And the Khedive appears to have seen this, and met the feeling of his people half-way, by inviting the opinion of the Judges of the International Tribunals on this extension of their powers. It is stated that they are unanimously in favour of taking in causes between native parties, and differ only as to the means by which this would best be effected, whether by an increased European Bench more widely spread through the country, or by utilisation of the native element in the Judicature. It is not improbable that native feeling would be in favour of a European rather than a native magistracy. The existing staff of Judges is, no doubt, overworked, not only for want of numbers, but also, as is shown by M. Jozon, in an interesting essay on the Egyptian Courts (*Bulletin de la Société de Législation Comparée*, Paris. Juillet, 1877), from want of practice in the French and Italian languages and laws. About half of the magistrates, it would seem, are too little versed in those languages to be able to render the same amount of services as their colleagues. This want is felt most in the drawing up of judgments, and the giving of audiences. The same, of course, may to a great extent be said of the native members of the Courts, though they are acknowledged to be picked men, and are of use in affording a means of checking interpreters in Court, and also in giving information as to local customs. It appears from M. Jozon's account that the Court of Alexandria is ambitious of creating a Jurisprudence of its own, and that its elements are taken from the principal Supreme Courts of Europe, with a special leaning towards giving authority to the judgments of the French Court of Cassation. M. Jozon's testimony is most emphatic on the point of the value set by the natives upon the International Courts, before which, he says, they more and more endeavour to bring their cases. The truth of this statement is amply borne out by the news we give of the proposed extension of jurisdiction, and it is not without bearing on the solution of the interminable "Eastern Question."

# THE LAW MAGAZINE AND REVIEW.

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No. CCXXXI.—FEBRUARY, 1879.

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## I.—CYPRUS AND THE CAPITULATIONS.

SOME of the difficulties which we had foreseen as likely to present themselves before the British Administration of the Government of Cyprus have arisen since our last issue. As the subject is one of considerable importance alike to British interests and to the interests of Powers hitherto our friends, necessarily our neighbours, in the Levant, and is also one intimately connected with the preservation of harmonious International relations between our own country and the other Western Powers, we propose taking up the thread of our discussion at the new point of departure afforded by the Capitulations. During the sitting of Thursday, 12th December, 1878, Sir Charles Dilke asked a question concerning an act of seeming high-handedness on the part of the Courts in Cyprus, to which we had referred in a note to our article on *Law in Cyprus* in the November issue of this Review. Sir Charles enquired,\* “whether, in October last, Mr. di Cesnola, an American citizen, was tried for an offence against Turkish law in digging up objects of antiquarian interest without a firman, by the district Court of Larnaca in Cyprus; whether the Court was presided over by a Turkish Cadi, assisted by an English assessor; whether Mr. di Cesnola was sentenced to a fine, afterwards remitted by Sir Garnet Wolseley, and the confiscation of

\* *Daily News*, Summary of Parliament, Friday, 13th December, 1878.



the objects found pronounced by the Court; whether the latter portion of the judgment was carried into effect; whether any protest was made by Mr. di Cesnola against the jurisdiction of the Court; whether Turkish sovereignty continues to exist in Cyprus, and, if so, what power there is to try foreigners, not being British subjects, in disregard of the Capitulations; whether appeals from the Courts in Cyprus to Constantinople will be allowed by Her Majesty's Government; and whether there exists any correspondence on the subject of Jurisdiction in Cyprus."

To this very comprehensive series of interrogatories, the Under Secretary for Foreign Affairs made answer briefly,\* that "Mr. di Cesnola, described as an American, was tried before a district Court in Cyprus, assisted by an English Assessor," and he answered the questions regarding the judgment and the protest of Mr. di Cesnola in the affirmative. That is to say, Mr. Bourke admitted the facts, that a foreigner was sentenced by a Cypriot Court, under the presidency of an Ottoman Judge, for an offence against Ottoman Law, on soil the government of which is administered by Great Britain.

Mr. Bourke went on to say that, "As to the question whether Turkish sovereignty continued to exist in Cyprus, he could only refer the hon. Baronet to the Convention on the subject." Here, according to the report we cite, the House, seeing the thing in a jocular light, was moved to "laughter." Whether honourable members, seized with a sudden zeal for exploration, and caught red-handed in the unwitting perpetration of a similar offence to that with which Mr. di Cesnola was charged, would have been equally ready to laugh if subjected to the same treatment as Mr. di Cesnola, may be left to the judgment of our readers. Some dim sort of idea that he was treating the subject too lightly does seem to have passed through the mind of the Under

\* *Daily News*, *ut supra*.

Secretary, when he roused "ironical cheers" by begging the hon. Baronet "not to think that he was treating him with discourtesy. It was really the best answer he could give him." Possibly, some members may have thought, "bad is the best," and have attempted to express this feeling in the irony which they threw into their cheers. "With regard to Jurisdiction in Cyprus," the Under Secretary proceeded to say, "arrangements were now in progress and would, he hoped, soon be completed." The case for the Foreign Office was brought to a close by a statement, rather astounding to our limited intelligence when read by the light of admitted facts, to the effect that "Every precaution was taken to secure a fair trial to any foreigner who might be charged with an offence." We should rather like to know who charged Mr. di Cesnola with his offence, which was one not against British but Ottoman law, and whether there is in Cyprus such an official as an Ottoman Crown Prosecutor, by whom the heinous crime of digging up old stones and old bones is charged against the luckless foreigner who has come to what he probably supposed to be a British colony or dependency, without a previous study of Ottoman law. In regard to the "negotiations" which Mr. Bourke had referred to in his reply to Sir Charles Dilke, when pressed by Sir William Vernon Harcourt, he changed his phrase to "arrangements," which he said was "a better word." In fact, having first spoken of "negotiations," the Under Secretary for Foreign Affairs proceeded, with really magnificent *sang froid*, to entirely change his front, and aver that "there was *no negotiation* going on between any other Power and Her Majesty's Government." With respect to two important questions put by Sir Charles Dilke as to the Court to which appeals from Cyprus would go up, Mr. Bourke gave what may have been to some persons the startling information that "*no appeal* from the Cyprus Courts to Constantinople was allowed by Her Majesty's Govern-

ment," and with regard to jurisdiction, that "there was no correspondence on the subject of jurisdiction with any other Government."

"Bourke locutus est, causa finita est."

There are in Cyprus no capitulations; there are in Cyprus no Consular Courts; there is in Cyprus not so much protection to the foreigner, whether British or of any other nationality, as is afforded under the Capitulations by the required presence of the Consular Dragoman of the defendant's country; there is from the district Courts of Cyprus no appeal.

If we may see in Cyprus a representation in miniature, as presumably we may, of the legal position of foreigners throughout Asia Minor, under that "Asian Mystery," the British Protectorate, we may be excused for doubting whether the picture is so attractive as to be likely to draw men and money into the "noble work of regenerating" the Asiatic Provinces of the Turkish Empire. For the Turkish Empire is the Turkish Empire still by the constant and solemnly reiterated asseverations of the British Government; and the sovereignty of Asia Minor, as of Cyprus, is as constantly and solemnly asserted still to be vested in the Sublime Porte of Felicity, the Gate of Justice, the Pillar of the Universe, the Shadow of God upon Earth. What matter if all the Western Nations do not see in the Porte the same amount of Felicity, the same love of Justice, as must evidently have been visible to the eyes of British statesmen? God is great; and Mohammed is the Prophet of God. And perhaps, when a sufficient number of the subjects of the Western Nations shall have been condemned by Cypriot district Courts without appeal, the unbelievers will at last acknowledge that the Gateways of the East are in truth the Gateways of Felicity, and that Ottoman Law is a stream pure and undefiled, flowing from the Fountain of Justice. Meanwhile, with that melancholy distrust of Turkish Law which seems so in-

veterate a feature of Western relations with the Turkish ruler of the New Rome, our friends and neighbours, who have hitherto been living in the Levant under the protection of the Capitulations, do not seem at all inclined to give up the shelter from despotic treatment under which they have for centuries dwelt in security. They go so far, it would seem,\* as to denounce the ignoring of the Capitulations in Cyprus as involving a breach of International Law and Treaty engagements. And they go on to hint that the rest of the powers must recall Great Britain to a sense of the necessity of observing Treaty obligations. This is the language held towards a country whose government, not so long ago, stood forth in the character (at any rate self-attributed) of champion of the Public Law of Europe, guardian and defender of Treaties. How has such a noble mission failed in being accepted by the rest of the countries of Europe? How have we, in so short a time, fallen from so high an estate? And what is the nature of these Treaty obligations which we are to be reminded that it is our duty to observe; what are these Capitulations which we are plainly told we are considered to have violated?

The enquiry that we are thus led to enter upon, is one which may not be without interest in connection alike with the History of Public International Law and the Doctrine of Exterritoriality, and it is certainly not without the interest arising from the circumstance of its being a practical question of the day. At the outset we are met by the difficulty that little is said about the Capitulations in the most familiar English and American Text-writers. This fact, remarkable as it may appear, furnishes us with an additional reason for pursuing our own investigations. Where Wheaton, Twiss, Halleck, and Abdy's Kent, fail to give us adequate light, we must have recourse to other sources of

\* *Daily News*, Monday, 23rd December, 1878, citing the Roman journal, "Il Diritto."

information, much as we must regret not having them as guides in the whole of our present course of studies.

It is quite possible that few of our readers are aware how far back the Capitulations have their place in the story of the legal and diplomatic relations between the Western Nations and the Turkish representative of Islam. The earliest of which we have been able to find mention, was concluded by the Republic of Pisa, in 1173, thirty years before the Latin Conquest of Constantinople; the next in date was made by the Venetians in the year following the enthronement of the Turks on the seat of the Cæsar of New Rome. The Capitulation which governs the existing relations between French subjects and the Porte was concluded in 1740, between Sultan Mahmoud, "son of the Sultan Mustapha, ever victorious," and his "very magnificent, honoured, and ancient friend, Louis XV., the glory of the Princes of the Faith of Jesus, the Emperor of France, and of other vast dependent kingdoms." We may remark, as a point not without significance under present circumstances, that in the long roll of sonorous titles inscribed in this Capitulation one of the designations of Sultan Mahmoud, son of Sultan Mustapha, is "Lord of Cyprus." When we ask what appears to be the legal aspect of the Capitulations we find ourselves in presence of two conflicting views. The ordinary view seems to be that they are concessions granted as favours by the Sublime Porte to the Christian nations which enjoy their benefits. This is the line taken even in an otherwise valuable Paper on the Judicial Reform in Egypt, read by M. Louis Renault before the Society of Comparative Legislation.\*

We shall have occasion to cite some interesting details from M. Renault, but examination of the text of the Capitulation of 1740 leads us to the opposite conclusion, ably advocated by M. Gavillot, Judge of the Correctional Tribunal of France at Cairo, in a work of considerable

\* "Bulletin," May, 1875. (Paris: Cotillon.)

importance on the Rights of Europeans in Turkey and Egypt.\* M. Gavillot claims, and we think justly, to have proved, by the texts which he prints, that the Capitulations, far from being spontaneous concessions on the part of the Ottoman Sultans, were true synallagmatic conventions, stipulating, from the date of the Venetian Capitulation of 1454, and the first French one in 1535, down to that of 1740, already cited, for reciprocity of engagements between the contracting parties. This last view seems to us to be as natural as we believe it to be correct.

Let us now look a little into the language which was used by the "protector and master of Holy Jerusalem, the sovereign of the three great cities of Constantinople, Adrianople, and Broussa, and of Damascus, fragrance of Paradise," on the occasion of his convention with Louis XV. in 1741. We find from M. Gavillot, whose text is before us, that the Sultan recites the fact that the French "Emperor," his "sincere and ancient friend," had sent to the Sublime Porte a letter containing testimonies of his most perfect sincerity and affection; and that, further, in this letter there was question, in consideration of the sincere friendship and special attachment which France had always testified to the Imperial House of Othman, of renewing, during the happy time of the then Sultan's glorious reign (*pendant l'heureux temps de notre glorieux règne*), and of strengthening and explaining, by the addition of fresh articles, the Imperial Capitulations already renewed in the year of the Hegira, 1084 (A.D. 1673). "Which Capitulations," says Sultan Mahmoud, "had for their object that the Ambassadors, Consuls, interpreters, merchants, and others, French subjects, should be protected and kept in all repose and tranquillity (*que les Ambassadeurs, Consuls, interprètes, négociants, et autres sujets de la France, soient protégés et maintenus en tous (sic) repos et tranquillité*);"

\* *Essai sur les Droits des Européens en Turquie et en Egypte.* Par J. C. Aristide Gavillot. Paris: Dentu, 1875.

and, lastly, it had come to the Imperial knowledge that a conference had been held on these points between the French Ambassador and the Ministers of the Sublime Porte (*qu'il a été conféré sur ces points entre ledit Ambassadeur et les Ministres de notre Sublime Porte*). Things being thus prepared, the Pillar of Justice, desiring to promote the activity of commerce, and the safety of those coming and going to and fro, not only "by these presents did confirm, in all their extent, the ancient and renewed capitulations, and the fresh articles thereof;" but in order to procure still more peace for merchants and activity for commerce, did accord exemption from the right of *Mézétérie* (a Custom-house tax imposed in Constantinople), as well as several other points concerning commerce and the security of travellers, which had been "in due and proper form discussed, treated, and regulated in the various conferences held for this end between the said Ambassador (Louis de St. Sauveur, Marquis de Villeneuve) who was furnished with sufficient powers, and the persons named on the part of the Sublime Porte" (*discutés, traités et réglés en bonne et due forme dans les diverses conférences qui se sont tenues à ce sujet entre le susdit Ambassadeur, muni d'un pouvoir suffisant, et les personnes proposées de la part de notre Sublime Porte*).

The conclusion of the whole matter is that the Sultan declares "we have accorded our Imperial ratification (notre signe Impérial) for the execution of the newly agreed articles, and, consequently, the old capitulations having been faithfully transcribed and set down word for word at the head, followed by the articles newly accorded; these present capitulations have been remitted and consigned into the hands of the said Ambassador, and for the execution thereof the Imperial mandate has gone forth."

We have been thus particular in laying before our readers the exact terms of the Capitulation of 1740, even at the risk of seeming somewhat tediously particular, because we are

unable to see that any language could have been more deliberately chosen to express the fact that it was a Bi-lateral Contract, and also because we believe this language to be but little known. For ourselves, we must repeat, the statements setting forth the diplomatic meetings and discussions over the terms of the Capitulation are such as unequivocally mark it as an Agreement or Treaty between two High Contracting Powers; in a word, it is a synallagmatic convention. And we agree further with M. Gavillot, in thinking that the Capitulations constitute "a sort of International European Code, the common patrimony of all the Christian Powers." That such a "patrimony" should be clung to with tenacity, even where a Christian Power may temporarily occupy the anomalous position of administrator of a portion of the government of the Sublime Porte, is to us at least no matter for wonder in the face of the unquestioned rottenness of Ottoman justice, and the equally unquestioned antagonism between the Frank and the Moslem. There may be room for wonder that the British Government should ever have thought it would be otherwise, and that it should have assumed, as apparently it did assume, that the mere hoisting of the Union Jack, and the cheering of a few holiday-making natives, would transform the nature of the Cadi, the Zaptieh, and the Defterdar, and that each would henceforth be a new and uncorrupt man.

"Heu, sancta simplicitas!" How art thou deceived! But it may be questioned whether our Government ought not to have read not merely its Finlay and its Freeman, but its contemporary history. Had the story of the First Ottoman Parliament been duly studied by those who sent out admirals and generals to administer civil government amidst the marshes of Larnaca and Nicosia, they might have remembered the pathetic cry, "Who will deliver us from the Defterdar?" And this, be it remembered, for the point is a very important one, was the cry of the Mohammedan



members of the First Parliament of the Ottoman Empire. If anything could put life into the rapidly declining descendant of Othman the bone-breaker, it would be the outspoken demand for reform on the part of the still dominant caste, the Turkish minority in the Ottoman Empire, who are themselves all that remain of what was once a body instinct with life.

So far are the Western Powers from being likely to give up readily the protection afforded to their subjects by the Capitulations that, as M. Louis Renault observes in his Paper on the Egyptian Judicial Reform, they have even been accused of stretching those rights. One of the gravamina of the Egyptian Government, in fact, was that the Consular Jurisdiction had been greatly extended by encroachments on the Capitulations. These encroachments, assuming their reality, are certainly evidence of European distrust of the local courts in Mohammedan countries. And this distrust, says M. Renault, was so great that the Viceroys themselves respected it, and endeavoured to meet it by the creation of special commissions for the judgment of suits against foreigners. M. Renault sets forth in the strongest language the fact that the Egyptian Government was obliged to yield to the feelings of the Europeans who, he says, "would certainly never have gone before the local courts either in civil or criminal cases." These statements, it should be noted, are based on the Diplomatic Documents published by the French Ministry for Foreign Affairs in November, 1869, and January, 1875. It should also be remarked that the various governments which agreed to the suspension of the Consular judicial privileges of their respective nationalities, in order to give the proposed International Courts a fair trial, only agreed to that suspension as a temporary measure during the period of five years for which the appointments of the judges were made. The rights guaranteed by the Capitulations are therefore not extinct, even in Egypt, but only suspended

for a definite period, at the expiration of which they will *ipso facto* revive,\* unless a further suspension be then decreed. In Cyprus, however, nothing of this sort has taken place. The Sultan is still "Lord of Cyprus" as he was in the days of Louis XV., and he has not consented to the establishment of any International courts in Cyprus. On the other hand the Western Powers have in no one case known to us suspended any of the rights and privileges accruing to their Consuls and their subjects in Cyprus, or indeed in any other part of the Levant, save Egypt. The conclusion therefore is inevitable, to our mind, that wheresoever throughout the Ottoman Empire the Capitulations have not been "totidem verbis," suspended or abrogated, there they are still in force. And for Great Britain to assume the opposite would be, apart from the grave questions of Law and Fact, a very ungracious return towards at least one of her nearest neighbours on the Continent. For it was very properly pointed out by M. Louis Renault, long before the British administration of Cyprus was dreamed of, that in the first French Capitulation with the Porte, that of 1535, Francis I. caused the insertion of clauses reserving similar rights and privileges for the Pope and the King of England. But neither King nor Pope took advantage of these rights, and for a long time, says M. Renault, the French flag protected the commerce of all Europeans trading with Turkey. We do not, even after the answers given in the House to the questions of the honourable member for Chelsea, know very much about the way in which the Action against Mr. di Cesnola was brought. So far as we can understand, it must have been a mixed action, partly concerning moveables, partly immoveables. It might be interesting, as a

\* After the expiration of five years, "if experience is not favourable to the practical utility of the Judicial Reform, it shall be lawful for the Powers either to return to the old state of things, or to make new arrangements with the Egyptian Government." Renault, *op. cit.*

matter of theoretical justice, to know whether all the somewhat remarkable provisions of Book XIV., of the Ottoman Civil Code were duly carried out. By Art. 1619, it is laid down that the subject of litigation must be determinate, or the action is null and void. By Art. 1620, it is laid down that when the subject is a moveable and determinate, it shall suffice, if it be before the Judge, to show it to him, and if it be not before him to draw up its description and declare its value. If it be an immoveable, it is necessary that its limits should be stated. This requirement is greatly improved upon in Art. 1623, which enacts that when the subject of litigation is an immoveable, the plaintiff and his witnesses must describe the town or village, the district and street in which it is situated, the property contiguous to it on three or four sides, the names of the owners of such property, and of their fathers and grandfathers.

It will thus be seen that it might prove to be a very serious matter if the British assessor in the Court which condemned Mr. di Cesnola did not see that the presiding Judge, the District Cadi, took care to have put in before him a statement of the value of the soil in which the antiquities claimed by the Ottoman Porte were found, the value of the antiquities themselves, and the names of the fathers and grandfathers of the adjacent proprietors of land on three or four sides of the soil which Mr. di Cesnola had broken up. And if any coins were among his discoveries, it would not be sufficient for the State simply to claim them under the generic designation of money, for by Art. 1626, when money is claimed it is necessary to specify the number of pieces, and the mintage, whether Ottoman, English, &c., and whether the coins be of gold, silver, or copper. There is yet another point worthy of remark: By Article 18 of the Imperial Ottoman Constitution of 7 Zilhidjé, 1293 (23rd December, 1876), it is enacted that, "a knowledge of the Turkish language, which is the official language of the State, is necessary for admission to public

functions." It would be interesting to learn whether the British Assessor in the Cypriot District Court which condemned Mr. di Cesnola, had this necessary knowledge, as if not, he was clearly not a public functionary in the eyes of Ottoman Law, and his presence, or the presence of any such nominal Assessor in any Cypriot Court, must have been, and must continue to be, a work of supererogation, and such works, we know on good authority, cannot be taught without arrogance and impiety. We should be sorry to think so ill of the British Administration in Cyprus.

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## II.—ON EVIDENCE AS APPLIED TO HISTORY.

I PROPOSE to take, in illustration of my subject, the character of the Duke of Marlborough as drawn by Lord Macaulay.

All technical rules as to the admission or rejection of evidence in any system or systems of Law, are to be disregarded by the writer or student of history. Admitting everything from which any rational inference can be drawn, still he who has to judge of fact, including character and motive, and in consequence to infer the unknown from the known, must proceed upon sound principles of induction. Whether his inquiry be judicial, scientific, or historical, an investigator is subject to the equal rule of reason.

If the imaginative faculty had been wanting in our most attractive writer of English history, Lord Macaulay, his work would never have become a household book, ministering alike to the amusement and instruction of millions. The critical essayist on history writes to the few. In early youth, that history pleases the reader most which

is mixed with fable and is dramatic in effect. A story in the 'mouth of an illiterate repeater falls naturally into a dramatic shape. Exaggerations, not immoderate, please and attract. The orientalisms which pervade our Sacred Scriptures tend to make them popular reading. All sacred writings, with which I am acquainted, gratify this popular taste, which one, who writes for the million, almost unconsciously indulges.

Lord Macaulay's style abounds with metaphor. Metaphors are chartered libertines in language. Exaggerations come as naturally from the pen of such a writer as leaves follow the flow of the sap. I translate Lord Macaulay as I read, and when I read of Marlborough as a man of "a hundred villainies, having a seared conscience, and an incurable moral disease," then, since the first is an exaggerated and the two following are metaphorical expressions, I read them, as I read orientalisms in Scripture, with the allowances and deductions which the sense requires.

A great writer, overflowing with knowledge, with an ardent enthusiasm for freedom, the growth of a vehement positive mind, a strong party-man, a suppressed poet endowed with a rich and fertile imagination, setting before himself a lasting work for millions and for all time, will necessarily display all the parts of his nature in his labour of love. His history reproduces himself. As I read it, I seem to hear him once more. Exactness of estimation I did not expect to find in his work, for the character of such painters is to dash off rather than touch and re-touch a likeness. The history, not faultless, is yet a noble work, a lasting rich possession for the lovers of liberty in its true sense, "for who loves that must first be wise and good." We must follow the spirit, rather than the letter, of his history. Johnson ridicules, in Sir John Dalrymple, that style in history which Sir John was not equal to manage, in which secret actions and thoughts of some person are detailed by an author to his reader with the fulness and

accuracy of an eye-witness, or a hearer of thoughts embodied in words.\* Yet what historian has not to some extent allowed himself this liberty of the imagination? Bayle, in his article, Tacite, has thus condemned that habit in the Roman Historian, "Ce n'est pas qu'il n'y ait bien à reprendre dans l'affectation de son langage, et dans celle de rechercher les motifs secrets des actions."

Every historical hypothesis must rest on some basis of fact. One conjecture may be met by another. The same feelings which influence our judgments of the living, should even more strictly guide us when we sit in judgment on the dead. After death, especially, men should not be subjected to unfriendly construction, since they cannot be heard in their own defence. When we sit in judgment on a dead man, we should be ready to suppose matter of excuse equally with matter of charge. A man should be judged by the moral standard of his own times. Lastly, a man's whole life should be taken as one whole, and changes for the better in his after life, should, *primâ facie*, be taken as proofs of amended morals.

Churchill was bred in a vile court, wherein was neither the practice of, nor belief in, chastity. His life from puberty to his marriage, at 28 years of age, was like that of his associates, licentious; but he was not grossly profligate. He was capable of entertaining a virtuous passion. He loved and was loved, he married her he loved who returned his love. She was poor and he was poor; he preferred her to an heiress whom he might have wedded, therefore avarice did not dominate him. The course of the passions ran pure throughout his married life of nearly half-a-century.

By one considering the character of Sarah, Duchess of Marlborough, without prejudice, a husband who could live with her forty-four years, in peace and love, a tender, patient, and forbearing lover, the calm, clear observer and

\* See 1 Ed. Croker's Boswell. Index tit. Dalrymple.

approver of her outbreaks of temper and inveterate hates, must be pronounced in that character a model to all husbands. He was besides an affectionate liberal father, an indulgent master, and though a reserved man, he had friends and was the object of friendship. The permanent stain on his private life is an occasional mean acquisition, and a general illiberal use of money. The evidence relating to that vice I shall examine in detail at a later stage of these remarks, whilst endeavouring to limit by the evidence censures exaggerating the fault.

On one reflection, viz., that Churchill made money when young by his person, and when older by his sword, I must observe that the latter part of this pointed sentence really conveys no charge, since Churchill did not hire out his sword, but merely took what it brought him. As well might it be said that a general enriched by prize-money made money by his sword. In an innocent sense the observation would be true. As to the first part of this charge, the evidence is that the Duchess of Cleveland gave him £5,000, which he prudently invested. Her character has fixed the worser stain on him. She was a relation of his mother. This gift does not prove that their intercourse was, on either side, mercenary. A wider conclusion has been drawn than the premises warrant. All that we are entitled to say of it is, that it was a mean, a dishonourable, acquisition. It proves no habit of the kind imputed to Marlborough.

Our kings seem, as to themselves, to have stretched their favourite dispensing power to a repeal of the seventh commandment. The moral sense was so faint in their subjects, their power to express it so restrained, that they looked whilst kings raised their mistresses even to the highest rank in the peerage, and endowed them with national wealth. Churchill then was not worse than the common run of men of that age, for not rejecting the patronage of one, his master's keeper, whom modern brothers would shun. This

courtier-like compliance, however common in those days, must be ranked as one of Churchill's meannesses, and amongst the gravest of them.

Patronage, however, did not raise him as a soldier, it merely gave him opportunity. As a soldier, his merit advanced him, and in the career of arms his escutcheon is without a blot.

Avarice is imputed to Marlborough by most writers. The evidence does not sustain the imputation of sordid living or habits, it sustains the charge, not of inordinate but of mean acquisition, and of unchristian parsimony in the use of money. It is customary to attribute to the miser alone the sin of not giving where money should be given, but the censure should be extended also to the spendthrift and to many a careful raiser of a moderate fortune. Since it is a Christian duty to give of our superfluity to the poor and needy, and as few men who give nothing away, have not, or may not have, some superfluity, this particular sin of neglecting the many for the nearer few, is one of very common commission. As these gifts of love and charity must be proportionate to means, and subordinate to duty, the violation of them must be dependent, as to its degree, upon varying circumstances, as rank, station, office, number of children, and so forth. We praise the poor provident man who joins a club, invests in a savings bank, insures his life, &c., and the praise is just; for prudence and self-control, with self-sacrifice, are virtues. What is a virtue in one rank of life cannot be a vice in another, and the question must always be, when we condemn a man for his accumulations of wealth made by himself, whether they are excessive, regard being had to his position and the just expectations of his family, or are in themselves reasonable in relation to the same circumstances.

The evidence shows that Churchill's marriage was delayed by poverty. He married at 28 years of age



when he had been 12 years a soldier ; he had risen then to distinction ; he had been thanked by the order of the French King, by Turenne at the head of the army. On another occasion he was presented by Monmouth to Charles II., with these or similar words, "To this brave officer I owe my life." As Charles had no money to give, he rewarded Churchill with a peerage, a doubtful benefit to one who had then no estate equal to support the title of peer. When James came to the Throne the future deserter was made an Earl. At that time also he had no state equal to support his title. In the first year of Anne's reign she raised the Earl to the rank of Duke. The Duchess was averse, for she said, truly, their estate was then unequal to support that higher dignity. This was in the first year of the war, when his vast emoluments were but beginning. These large gains, however, were of uncertain continuance. His life was constantly exposed to great risks. Had the cannon-ball, which took off the head of the officer who was holding his stirrup, killed Marlborough, he would then have left an estate unequal to the maintenance of his whole family in their respective degrees. Had his son lived, the four daughters of Marlborough, who were married to the heirs of peerages, two of which were very slenderly endowed, would have had no abundance of wealth.

It could not then be foreseen that the war would last as long as the siege of Troy, that Marlborough's son would die, that Marlborough would survive his command twelve years, and that accumulations would raise for his descendants an ample estate and provision for all. During much the larger portion, therefore, of Marlborough's life, his living had proper objects and a proper motive. If disproportionate to the reasonable wants of his family, it came so by accident, which could not, during the earlier accumulations, have been foreseen. The evidence then does not support the charge that he was a miser, a harpagon

from his youth. If avarice was his sin, the facts rather prove that thrift grew to avarice. Experience shows how a vice will grow from, and overpower, a virtue.

The "immense wealth" which he left (to use the language of Coxe), in itself proves no sin of commission, or omission, since we have known several commoners, all liberal and generous men, leave a larger property to their children or descendants, commoners still. Before the death of the Marquis of Blandford, Marlborough had to found and endow one Dukedom with wealth, and to leave, as I have already observed, adequate fortunes to four daughters, all of whom had married into noble families of no rank lower than an Earldom, two of which titles were very slenderly endowed. Noble as was the endowment made for the future Dukes of Marlborough, it was not an excessive provision, and great as was the whole wealth of the great Duke, it was not an excessive provision for his descendants.

The property which Marlborough left may be readily accounted for by calculating the accumulations for twenty years on the great savings made by parsimony from a large income.

If the Duchess had survived her husband but one year, instead of living 25 years after him, the whole descendants of Marlborough would not, in that case, have been wealthy, in proportion to their rank. The accumulations of the Duchess raised the Sunderland branch, the descendants of a younger son of her second daughter, to equal affluence with the elder branch from that daughter, which succeeded in time to the Dukedom. The just conclusion from the evidence is, that he did not lend to the Lord a proportionate part, and so was illiberal and ungenerous, but with exceptions of occasional bounty. No charge of falsehood, treachery, or want of fidelity to engagements was preferred against him, until that time of trial when the misconduct of their King forced on the

subjects of James a hard choice, between their King and their religion. The religious question dethroned the King.

Churchill abandoned his Patron, Benefactor and King. He went over to the Prince of Orange, that is, to the Parliament, for in fact he voted for a Regency. From the time of that desertion, the stain of perfidy has fouled his reputation. It has coloured every narrative. Even Evelyn, not his enemy, writes of him, "Note this was the Lord who was entirely advanced by King James, and was the first who betrayed and forsook his master." Yet Evelyn, writes of James, that, under the advice of Jesuits, "he indiscreetly attempted to bring in Popery, and make himself absolute in imitation of the French." Anyone reading the two entries together will see reason for not subscribing to the implied charge of the first. The King and the Jacobites may be laid aside as accusers. Judged by their principles Marlborough was a Judas. As Marlborough was not an enemy to large kingly power, our modern love of power in the people cannot be invoked in his favour. His justification was that he could not fight against his religion. He must be judged by the broad principles of the foundations of duty. What was the duty then of a Protestant subject of King James, surrounded by danger of civil war, and torn by conflicting obligations? It is impossible to cut the knot by calling Marlborough a hypocrite. "Thou should'st not have said so, said my Uncle Toby, God only knows who is a hypocrite." The evidence establishes that Churchill remonstrated with James, and warned him of the tendency of his measures; declared, then, to him, that if they were pursued he must resign his service, and subsequently to the Prince of Orange he said that he could not fight against his religion. "My life," said he, "has not been that of a saint, but I will not fight against my religion." His whole correspondence seems to prove that whether he acted up to the precepts of his religion or not, he not merely professed

but entertained a strong preference for the Protestant faith and his own Church. His case then cannot be separated from that of others, who invited William to invade the realm, some of whom also were bound by ties of gratitude to the King. Men in general will like a Dundee better than a Churchill, but unless it is a higher duty to plunge your country into a civil war than to avert civil war altogether from it, reason will not follow here the guidance of the feelings. James could never be brought to see his own faults, but he in truth cut the tie of allegiance that bound his subjects to him. In such a conflict the first duty of the subject is to his country, the King being false to his trust. If then the Revolution of 1688 be justifiable, Churchill stands justified for his desertion of James. A true sword is servant to the Laws. Our revolution was defensive.

But "he led others." Surely a man may persuade others to do that which it is right in him to do, circumstances being the same? But "he strongly protested his fidelity, even whilst meditating a treason." He did so, but he lied under the pressure of interrogation. So pressed, Compton prevaricated, Churchill lied. In neither case do their acts and words prove the men to have been habitually liars or deceivers. Under question, silence is confession. It may have been their duty to speak the exact naked truth, and to ruin their cause with those engaged in it. If so it is a duty of such rare performance, that no one can be branded as "turpissimus," who so pressed, shelters himself, his cause, and his associates, under an untruth.

Upon a just and reasonable construction of the acts of the life of Marlborough, he is found not guilty of more than ordinary, though grave, faults, until the time of his correspondence with the dethroned monarch. That charge, made in his lifetime, was supported by no evidence until long after his death, when on the publication of the Stuart papers, his guilt came to light. These papers prove him guilty of

son, on the face of them. What was his real offence not clear.

He had not an opportunity of explaining the motives or design of that treasonable correspondence. Judged by his own words he must be convicted of treason, that of endeavouring to restore James. This treason is extenuated by the evidence of John Hedecon Coxe, his most favourable biographer, who uses the term "amusive" in the sense of deluding by hopes falsely raised. Mr. Paget, in his *Examen*, and other writers, have also so extenuated the crime.

A familiar phrase, it is said of him, as of others, that "he hedged." It may be so. The evidence in some degree supports this conclusion. James, on whose evidence alone the treason is proved, grumbles at being tricked, as it were, out of a pardon, for no service rendered in return. He uses the querulous tone of one duped in a bargain. The meagreness and tardiness of the intelligence given by Marlborough to James proves the distrust of the latter not to have been groundless. Be this as it may, nevertheless, the falsehood, double dealing, and cruelty of all these treacherous courses, duping the unfortunate, encouraging traitors, and disheartening the loyal, leave an indelible stain on his memory, little, if at all, short of the crime of treason. Still, a traitor, once, is not always a traitor. Had Churchill been found out, pardoned, and employed by William, and had he then served his sovereign well and faithfully for 14 years or more, we should have said, that formerly a traitor he became a loyal and true subject of the crown. How then is the case varied, merely because his treason lay concealed? Condé and Turenne were both traitors, and Condé worse far than Churchill, since Condé fought at the head of the Spanish armies against his own sovereign. Both did good loyal service to Louis afterwards. Were they accounted too bad for praise?

Lord Macaulay supposes that Churchill meditated a double treason, viz., to baffle James, by raising Anne to the

throne on the overthrow of the sovereignty of William and Mary. This supposition is founded on no evidence whatever. Its original basis was mere suspicion: the suspicion of some unknown conspirators, a suspicion which James, who narrates it, treats as groundless; some, he says, very indiscreetly, by their communication to Bentinck, spoiled the real plot in which Marlborough was engaged, viz., that to restore James. Therefore, a mere suspicion, founded on a report of some persons unknown, to Bentinck, discredited by James, the sole reporter of it to aftertimes, not credited by William, who told Burnett that he believed Marlborough to have made his peace at St. Germain, is made the foundation of a charge of treason, which no historian before Lord Macaulay has seriously insisted on. It is, when examined, found to rest on no basis of evidence whatever. That mere conjecture may be met by a conjecture much more probable, but I have not space for the further exposure of its weakness as the basis of historical inference.

Lord Macaulay considers that Burnett, in his original MSS., confirmed the Memoir of James. The supposed confirmation is this, that he reports the same report. What confirmation is this? Both narrate hearsay. Their concurrence merely proves, or would prove, if in fact they concurred, that they had heard the same story and believed it. Burnett, however, in his history, drops the charge. Lord Macaulay attributes this variation in Burnett to party zeal. Marlborough and the Whigs, he says, were then acting together. Burnett was a Whig, and therefore in his history he softened matters against Marlborough. The facts, however, do not support this inference as to Burnett's motive, for Burnett and Marlborough were friends at an earlier date. Marlborough was the governor and Burnett the preceptor of the Duke of Gloucester. The governor was a Tory, the preceptor a Whig. They did not quarrel over their charge, but did their duty by him. It is plain

their mutual respect and liking had this origin. Mrs. Burnett was a friendly correspondent of the Duchess; her letters show the friendly feelings of the families. The common inference from history is, that if the writer of it has said a thing in his rough MSS. which he does not put into his printed history, he has seen reason to doubt its truth. The fact that he has given in to another error in his history about the same matter, and that his account is inexact, confused, and erroneous, may prove him to be ill-informed and in the dark, but it does not set up the dropped fable.

The "murder" of Talmash has been fully refuted by Mr. Paget in his *Examen*, to whose account I refer my readers. Had Marlborough, however, been the first to inform the French Government of the real destination of the expedition against Brest, still the inferences of Lord Macaulay, from that act of treason, would have been erroneously drawn. A man is an accessory to that crime which he means by his act to aid; not to a deed to which it leads, but which he has not conceived, and which does not necessarily flow from his meditated crime. Thus, if a porter quits his post at night, negligently leaves the door he is to guard unguarded, and thieves enter and steal, his negligence, though it has led to the loss, is not morally nor legally to be confounded with stealing. If he had left his post purposely, and with knowledge of the intended theft, then his moral guilt is that of theft, plus culpable and treacherous breach of duty. His legal crime is that of an accessory.

Mr. Wild gives his son, Jonathan Wild, this advice, "Never to do more mischief than the occasion requires, because mischief is much too precious a thing to be wasted." Therefore a Jonathan Wild would not plan a needless crime.

Men in general have motives for their crimes. A rival would not murder his competitor, whose disgrace would equally serve his purpose; therefore, under these rules of

construction of motives, Marlborough would not desire to do more than disgrace Talmash. To suppose he meant to murder him into the bargain, is to suppose Marlborough not up to the Wild axioms of mischief.

But would the disgrace of Talmash have been a reasonable and necessary consequence of Marlborough's information? Not so, because a prudent commander would not have attacked the place; and it would not be in the common course of things for a good soldier and prudent man like William to entrust an expedition to an incompetent man, or to censure his commander for the prudent conduct of an expedition. We find William and Shrewsbury both lamenting and condemning the rashness of the assault. Therefore the inference is not legitimate from the premises, even had the premises been true.

I have said that Marlborough's later public life was loyal and true. The evidence of this is too extensive to be inserted here. It may be found in the whole correspondence of Marlborough, a large part of which may be seen abridged in Coxe's "Life of Marlborough." It may be summarised thus: On the death of Mary, the internal feuds of royalty ceased. The King and the Princess Anne were reconciled. Marlborough offered his sword to be employed in the King's service. Shrewsbury advised the King to accept the service, saying, "his interest will keep him true." No high compliment to Marlborough, certainly. The King, at that time, declined, and a year or two later accepted that service. William was too wise a man to do anything by halves; accepting the service he trusted the man, and was well served. Marlborough always served faithfully those whom he served. His desertion of James, that King caused. William in his last year gave ample proof of his trust in Marlborough by employing him to negotiate the war treaties on which the subsequent war against France was based and carried on. That negotiation was fully and ably conducted to the entire satisfaction of William, who, dying, recom-



mended Anne to take Marlborough as her general and counsellor, whom William himself had chosen for his commander to conduct that war.

The commencement of Marlborough's good career as a politician, then, preceded the reign of Anne. The war was William's; he bequeathed it, as it were, to his successor. The war was defensive and just. For two reigns the French monarch was a secret conspirator with two English Kings in succession against the religion and the liberties of England. The French King was the supporter and maintainer of a standing treason by English subjects against William. The Jacobites admitted their sole hope to be in a French invasion. The Whigs were the war party, reasonably and justly. Therefore principle attracted them to Marlborough, and Marlborough to them. The Tories and Marlborough had no agreement as to the war, or the mode of conducting it. The Tories blamed Marlborough for coalescing with the Whigs. Their censure was groundless and unmerited. The war was the great political question of the times.

Throughout this long war Marlborough acted strictly upon, and executed the policy of, William. He was William himself redivivus, as the Spirit of the alliance, if not so great in policy, equally great in negotiation, and greater in arms. He advised Anne in the same spirit throughout, respectfully, boldly, honestly; strengthened the weakness of Godolphin, and was the animating, guiding mind of that great and just European Confederacy. No man before him did his country greater service. He re-made England England,—the England of Cromwell in the eyes of foreign rulers. Henceforward during Anne's reign and his power the evidence is overwhelming that he was a good minister, and a great statesman, consistent, firm, and true. If patience, self-control, silence under unjust charge, from good motives for a great purpose, are virtues, those virtues he amply exercised. If humanity to the wounded, including those of the enemy, respect for virtue in an enemy, tenderness to

the conquered, and freedom from the arrogance of success, care for his own troops, and liberality to young friendless officers are virtues, those virtues he displayed.

I do not enter into the charges of personal corruption, because they were preferred, met, and, as I think, answered by Marlborough in his lifetime. As he was pursued by the hate of party backed by power, we may reasonably infer that his enemies preferred every charge that had a plausible face of truth, and that none were dropped that could have been sustained. The whole subject may be found in our ordinary histories. Mr. Paget has gone fully into the charge of false musters in his Examen.

As I consider that the political life of Marlborough really closed with the reign of Anne, I carry my inquiry no further. The history of Lord Macaulay does not treat of any part of Marlborough's life during its highest phase. The joy of the French and of the Jacobites at Marlborough's disgrace is his eulogy. Bolingbroke, his enemy, lived to write his character, pronouncing him the greatest general and statesman of the time ; the moral character is briefly but not unfairly written. The evidence leads me to think of Marlborough as one fashioned to evil much by the bad times in which he lived, a great man debased, a man of weak moral principles too much swayed by self love, a courtier, a man unable to walk uprightly when bent to evil by the strong temptation of ambition and greed, yet on the whole inclining to good, doing great things for his country from right, though not wholly pure, motives ; a man of mighty deeds, two great sins, viz., his treason and his duplicity, long continued, some minor vices and many virtues, who had he lived in our better times, under the restraint of strong and good public opinion, might, in his public life, have been single in aim and loyal as Wellington, but who in those bad times, equal to Condé and Turenne in arms, was less in treason than either, a man to be admired, praised, blamed, and pitied.

LAURENCE PEEL.

### III.—THE CONSTITUTION OF HELIGOLAND.

**T**HE question to which we are about to draw the attention of our readers is one that concerns not merely the interests of the two thousand five hundred German inhabitants of the small British dependency of Heligoland, but the good faith of the British Government, and consequently the character of the British nation in the eyes of Europe. A work has been recently published on this subject by Dr. Friedrich Oetker,\* a politician well known in Germany as having been identified with the constitutional struggle in Hesse-Cassel in the years 1849 and 1850, which eventually led to the expulsion of the Elector, and to the incorporation of the Electorate in the dominions of the Prussian monarchy. Dr. Oetker was exiled for a time from his native country, and resided in Heligoland, where he studied the condition of the people, and their alleged grievances, and in 1855 he published a larger work (Berlin, F. Duncker), in which the subject was discussed in great detail. He described the confusion both in judicial and administrative affairs which had reigned in the island since its capture by Great Britain, and made some suggestions for the establishment of a more orderly state of things. These suggestions, however, as he states, were not attended to; but in the year 1864, and subsequently in 1868, the British government, of its own accord, introduced two successive sweeping alterations of the existing laws, which amounted to an overthrow of the constitution of the island, instead of having the character of moderate and judicious reforms. Dr. Oetker, in the midst of his present duties, as a member of the German Imperial Parliament, and also of the Prussian Diet, has found time to return to the

\* "Constitution and Right in Heligoland," by Friedrich Oetker. Stuttgart: A. B. Auerbach. 1878. Pp. 87. (London: Williams and Norgate).

grievances of his old friends in Heligoland, and has put forth the supplementary tract before us (in both the English and German languages) by way of an appeal to the tribunal of public opinion in England. He contends that the subversion of the ancient constitution was, in the first place, illegitimate, because in violation of old rights and explicit assurances; secondly, unjustifiable, because its professed objects might have been attained by other and more simple means; and thirdly, inadequate, since it failed to secure the results which it professed to seek.

The people of Heligoland, like those of the other islands which form the North Frisian group, speak the German language; and they belonged in former centuries to the Gottorp portion of the Duchy of Schleswig. In 1714 the island came, together with that territory, under Danish rule; and the liberties and privileges of the islanders appear to have been faithfully observed by the Danish kings up to the time of the cession to Great Britain in 1807. Besides the Danish military commandant, there was a bailiff (*Land-vogt*) who sat as judge, and directed the civil administration. He was supported by six native councilmen (*Rathsmänner*), and eight quartermasters (*Quartiersmänner* or *Viertelsmeister*). The councilmen were assessors in the law court, and likewise formed the principal element of the local government and representation. The quartermasters maintained order, and also managed the public funds and accounts, over which presided a treasurer chosen from their number. The office of the councilmen was for life, and they filled up vacancies in their own body; the quartermasters went out every eight years. For complaints in matters both of law and administration an appeal lay to the superior court at Gottorp, and in some cases to the Schleswig-Holstein chancery. The public accounts were subject to a comprehensive superior control. Ecclesiastical business came before the Schleswig consistory courts.

There were moreover sixteen elders (*Landes-älteste*) who, with the councilmen and quartermasters, constituted the representative body of the island. That body had the power, with the sanction of the sovereign, or his bailiff, of issuing laws called *Landes-beliebungen* for public objects, which guided the decisions of the law courts; and when royal ordinances had to be issued, it is said to have been the uniform practice that the representatives of the inhabitants should be previously heard.

When the island became a British possession the constitution above sketched did not entirely cease, but the bailiff, or civil administrator, was discontinued, and an appellate jurisdiction was assumed by the British military governor, much to the dissatisfaction of the parties concerned. However the affairs of the islanders rubbed on under some shadow of law and right until January, 1864, when an entirely new constitution was established (*octroyée*) by the royal authority; but unfortunately it would not work; and in February, 1868, the islanders were again surprised by a new order of the Queen in Council, abolishing the constitution of 1864, and with it all semblance of a representative system, and vesting the whole legislative and executive power within the island thenceforth in the governor alone. The government seems therefore to have become a despotic one, subject to no effective control beyond that of the Secretary of State for the Colonies in this country.

Dr. Oetker has endeavoured to show that both the constitution given in 1864, and the dictatorship established in 1868, were violations of the capitulation made between the British naval officers and the Danish commandant on the 5th of September, 1807, upon the occasion of the cession of the island to the British crown. That capitulation contained a clause guaranteeing to the Heligolanders the rights and liberties which they had enjoyed under their old constitution; and therefore, it is alleged, the British government

could not either legally or morally introduce a different constitution, much less a dictatorship, without their previous consent. Upon referring to the fourth article of the capitulation, as given in the pamphlet, we find it to run as follows :—

“ All magisterial and office-bearing persons, ecclesiastical and civil, and all inhabitants in general, are maintained undisturbed in their respective official duties, rights, occupations, form of church-government, *constitutions*, as also their families and dwellings, and all property is respected and protected.”

It is true that in the official papers laid before the House of Lords, in consequence of the motion made by the Earl of Rosebery, in March, 1876, the wording of the fourth article is somewhat different, for it runs that “ the inhabitants shall not be molested in their religious offices, occupations, and *privileges* ;” but the pamphlet points out that the German text of the capitulation, as deposited among the Heligoland court-rolls, was unquestionably the original, and was conclusive for the islanders, because the proposals emanated from the Danish-Heligoland side. We do not lay much stress upon these verbal discrepancies, seeing that the main question is whether the transfer of the sovereignty carried with it the power of changing the laws without the consent of the inhabitants? Far less do we attach any weight to the assertion that the terms of the surrender in 1807 were over-ridden by the treaty of Kiel in 1815, which formally ceded the island to Great Britain in full sovereignty. The treaty of 1815 did not alter, or even notice, the obligations of the British crown towards the islanders, which of course subsisted ; and the affairs of the island went on, in fact, upon the basis of the old constitution, though somewhat irregularly, for about half a century afterwards.

Our space will not permit us to follow Dr. Oetker through the long series of abuses with which he charges the govern-

ment of the island, and for which he sees only one remedy, namely, the restoration of the ancient constitution. We certainly think that he has made out a *prima facie* case for inquiry; and although we are far from imputing to the Colonial Office any wish to tyrannize over this handful of the Queen's German subjects, or to hold them in a state of slavery, it really does seem as if their case had not received that full investigation to which it is fairly entitled. According to the speech delivered by the Earl of Carnarvon at Edinburgh on the 5th of November last, the Secretary of State, who does his duty, is now to be considered by British colonists as *a friend to whom they may always appeal for the redress of their wrongs*. "The evils of despotism," observed his Lordship, "are sufficiently notorious. Imperialism must rest upon the sole foundation upon which all true things must rest, namely, that which is sound and moral. *We ought not to, and cannot, divorce our system of politics from our system of morals.*"

[COMMUNICATED.]

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#### IV.—THE MARRIAGE TIE IN ROMAN AND ENGLISH LAW.

**B**ENTHAM, in his "Theory of Legislation," commences his remarks on marriage by calling it a "noble contract, the tie of society, and the basis of civilization." This description, which very fairly sums up the important characteristics of the matrimonial tie, must commend itself to all those who have devoted any attention to the subject. Marriage has played an enormously important *rôle* in the world's history, and to trace out fully its influences, would be to fill volumes. The wideness of its range, and the interest attaching to it, make the subject difficult of treatment in an article like the present. If prolixity be avoided, there is risk that a mere skeleton may be presented to our view. As the term "marriage" has been already used, it may be as well at the outset to venture on a definition. By marriage we mean the union of a man and woman for an unlimited time, accompanied with some form or ceremony—religious, legal, or social—expressive of the consent of the parties themselves, or of those on whom they are dependent.

In discussing this more than merely temporary union of man and woman, we are considering in part, as a result, a form of society which, by many jurists, is deemed to be the earliest. Out of marriage grew the family, and for marriage the highest antiquity is claimed—even the antiquity of Divine appointment. Notwithstanding the fact that this bond has at times sat lightly upon mankind, yet the necessity for it has never been totally denied by any nation or people who have desired to perpetuate themselves. Even in the first dawn of civilization, the union in marriage of man and woman must have assumed a regard and importance which have not decreased, but rather have increased with the advance of Christianity and general enlightenment. The reason is



that a want of cohesion in the relations of individuals acts with tenfold force upon the interests of the tribe or nation composed of those individuals; for where there is no common bond for the units of a people in private, it will be too much to expect them to make common cause in public matters, not affecting life and death. This elementary cohesion must have been supplied by the Family, and the existence of the family undoubtedly depended on a ceremony which may be called marriage, although it may not be identical with what we now understand by the term.

As in the course of this article we shall notice marriage both from its religious and civil side, a probable reason for this double view of the question may be here put forward. Marriage, in the abstract, does seem to belong to the civil institutions of a tribe or nation, but there can be no doubt of the tendency shown by the nuptial rite to be inseparably bound up with a religious ceremony. This is explicable on two grounds, (1) from an idea of drawing an invidious distinction between regular marriage and unsanctioned intercourse, or concubinage, with the idea that obloquy should rest on the latter; and (2) from the combined legal and religious character of the priesthood in early ages. In all countries, from the earliest times, that order which takes care of the religious element has assumed the authority to settle and manage this question. Though the sacerdotal class acquired from this fact great power, as its members, from their education and pursuits, were better able to appreciate what was conducive to material prosperity than the lay and unlearned classes; yet its power was not generally abused in early times, as is proved by the wide acceptance of its rules. In process of time priests became lawyers, not, however, by neglecting religion for the law, but because while they ministered in holy things they dispensed justice. The people brought the priests hard questions to decide; the latter claimed in their judgments to be inspired by Heaven,

and as such demanded the respect of the suitors. These decisions were preserved by oral tradition and formed precedents for subsequent and similar cases. Gradually there arose a portion of the priestly class who gave themselves up to study these decisions, and to deliver like on similar occasions, leaving to their brethren the care of purely religious matters. This portion became ministers less of religious than legal mysteries, and devoted themselves so entirely to the latter that their sacerdotal character was lost and only their legal survived.\* This new body would not altogether forget and lay aside the peculiar line of thought with which it had been familiar, but would introduce rules and regulations embodying the spirit of the whole class of which they formerly were a part. This theory we put forward as a probable one to account for the fact that marriage, among other subjects, has a twofold aspect—religious and legal—the first as conducing to better morals, the latter as concerning the temporal welfare of the nation, and to explain how in modern times both Church and State claim it to be under their respective jurisdiction and supervision. It would be extremely interesting, if space would permit, to theorize on the matrimonial relations existing between primeval man and woman, and to discuss the subject of “comparative marriage,” setting forth the ideas on this subject prevailing in different countries with the respective rites and ceremonies, for every country has had its own notions on this subject, and all of them worthy of attention. There is, however, one nation which has shown such a remarkable pre-eminence in defining and settling all matters which involve legal conceptions, and which has exercised such a considerable influence over modern institutions and modern thought, that it is not possible, when discussing such a matter as we have in

\* Compare the History of Jewish Legal Institutions, and the evolving of the Lord Chancellor out of the Keeper of the King's Conscience, *i.e.*, his Confessor.

and, to pass it by in silence; of course we mean the Roman nation. No relation of life seems to have escaped the observation of these people, and whatever came under their view, if it could exercise their legal bent, was certain to be treated of in a methodical and exhaustive manner. With the Roman law on marriage we intend to compare the English, as offering a clearer contrast than that of any other system—*pace* the learned author of “Ancient Law,” who holds that our marriage ideas are essentially Roman. We would premise, however, that, since some portions of the English subject must deal with controversies, we shall offer no one-sided opinion as to which party is right or wrong, but endeavour to set out the views of both.

WHAT IS MARRIAGE?—*Roman Law*.—Modern writers have entered into an unnecessary discussion as to whether the Roman marriage should be ranged under real or consensual contracts, two sub-divisions of obligations arising *ex contractu* by *pollicitatio* and *conventio*. This is not essentially an important question; and the Romans themselves did not attempt to define marriage as a regular contract, because they were perfectly well aware that the marriage state was, in ordinary cases, the result of feelings which refused to be analysed by the hard and fast qualifications of commercial contracts. Those who hold it to be a consensual contract base their arguments on the dictum “*nuptias non concubitus, sed consensus facit* ;” but we shall, further on, attempt to show that the consensus was to be put into opposition to cohabitation, or, as Mr. Poste\* expresses it, “to the use of certain words or certain documents, or to the solemn and graceful ceremonial with which custom has surrounded the matrimonial union.” Consensual contracts could be formed when the contracting parties were not present to each other; whereas a marriage required the presence of both parties, except under certain circumstances, and then the woman

\* “The Elements of Roman Law,” Gaius, p. 55.

must be led to her husband's home, and married either by letters sent from the man, or by a proxy, in which events the husband's presence was sufficiently proved. For these reasons, says Ortolan, who is the chief holder in our times of the real contract view, we must deny that it is a consensual contract, but hold it to be a real one. Again, there must be a delivery of the woman over to her husband, which delivery of possession was a necessary element in real contracts. Savigny holds that it is not a contract at all, but is rather a transfer of dominion over human beings, and, as such, paralleled by adoption, emancipation, and the like. This theory, while being very applicable to the older marriages when the wife became *in manum viri*, has less point with reference to the later marriages, when the wife had greater independence both of person and of property.

We now come to the definition of marriage. Neither Ulpian nor Gaius venture on a definition of this state, and Paulus and Modestinus are the first to supply us with one. True that Ulpian tries to define *connubium*, by saying that it is a "*facultas uxoris jure ducendæ*," which is more of a statement than a definition. Paulus, in the "Institutes of Justinian," \* tells us, "*Nuptiæ sive matrimonium est viri et mulieris conjunctio, individuum vitæ consuetudinem continens.*" Modestinus, in the "Digest," † says, "*Nuptiæ sunt conjunctio maris et feminae, et omnis vitæ consortium, divini et humani juris communicatio.*" With these two definitions before us, we may say that the Roman conception of marriage was a tie which was to endure for an indefinite period, and not a mere temporary cohabitation (*concubinatus*). The wife was to be placed on a position in society equal to that of her husband; she was to be regarded as the mother of his household, as he was its father. The *communicatio humani juris* implies that she was to have an equal right of appeal to the protection of the law with her husband, whether as

\* Book I., Title ix, sec. i.

† Book XXIII., Title ii., sec. i.

gainst him or third parties, whether she were *in manum iri*, or *sui juris*, or dependent on her agnatic guardians.

The next question before our notice is, how was this tie brought about? By what ceremonies? Was plain consent, *nudus consensus*, the sole essential ingredient to testify to the world in general that a man and a woman agreed to live together? Were *confarreatio*, *coemptio*, and *usus* marriage ceremonies? Although it is an accepted fact that, as nations progress, their early complicated legal forms tend to simplify themselves, it is yet too much to say that no extrinsic evidence, other than mere cohabitation, was necessary to prove satisfactorily that a man and a woman had agreed to live together, from which union flowed many important legal results. We hold to our early definition of marriage, in which it is stated that it must be witnessed by some social, or religious, or legal ceremony. A marriage must have some attesting fact, whether it be a friendly gathering, or a benediction from a minister of religion, or the intervention of the law in regulating the property of the spouses. Marriage in Roman law, we are tolerably certain, was evidenced by some sort of formality or other; but neither *confarreatio*, *coemptio*, or *usus* was a marriage ceremony, *quâ* marriage ceremony cementing the nuptial tie, for they bear within themselves internal marks that they could not have been so used. To begin with the oldest, and for that reason the most solemn and complicated formality, *confarreatio*. This, in the earlier and more glorious times of the Roman republic was reserved for the patrician caste, and from its expensive formalities came within reach only of the wealthier portion of the patriciate. It was inseparably bound up with pagan worship, and when paganism became effete, it disappeared with it. Thus, *confarreatio* was not a ceremony common to all classes (but regular nuptial rites obtaining in nations are alike for all a kind, though in particular stations of life they may differ

in degree), and at a comparatively early period had died out. *Coemptio* was the fictitious sale of a woman to a man, who purchased her in the presence of five witnesses, and of one who was called the *libripens*, or medium of the purchase and sale. This process was not confined to the bringing of the wife *in manum viri*, but was extended to the liberation of the heiress from the onerous religious duties attaching to her *hereditas*, and to the emancipation of the female from the power of her guardians. Can a ceremony, which is used alike to enslave and liberate a woman, by which a woman cohabiting with a man as his *uxor*,\* and not *concubina*, can be brought under his power, entitling her to the epithet of *materfamilias*, be strictly called a marriage rite?

The third and last, *usus*, was the unbroken cohabitation of a woman with a man for a year. The results of *usus* were not settled until after the lapse of a year; and if a woman was married to a man, and lived with him for a whole year without availing herself of the right of absenting herself for three nights in the year, she was not more married to him at the expiration than at the commencement of that period, but she passed completely into his power and became to him *in loco filiae*.† An uninterrupted living together for a no less period than a whole year cannot be construed in any sense to imply a marriage ceremony. *Confarreatio*, *coemptio*, and *usus* were modes of contracting a marriage with a particular result—the subjection of the wife to the husband's power—but had nothing to do with the actual marriage contract or the ceremonies attesting the contract; though at times the first two may no doubt have served as adjuncts to the other rites.

We have now to decide whether Roman marriage required

\* An *uxor* was a regularly married woman, but not under the power of her husband, otherwise she would have been called *matrona* or *materfamilias*.

† The children born after the first year were not more legitimate than any child born within the first.

ything for its formation but plain consent. Warnkœnig  
 ys,\* "marriage is contracted without any solemnity, but  
 th bare consent if it stands on a basis of marital affection.  
 hence the following expression, 'consent, not cohabitation,  
 ukes a marriage.' Neither the authority of a magistrate,  
 r the priestly benediction is requisite. However, among  
 rsons of high rank marriage is never celebrated except  
 th the addition of instruments of dower." The *consensus* of  
 e contracting parties, and of those in whose power they  
 re, was of course a necessary ingredient in, but not the  
 e qualification of, marriage. If there was no need of any  
 emony, religious, legal, or social, how was the *maritalis*  
*actio* (on which so much stress is laid) made known at any  
 e in the marriages of patricians in that intermediate  
 ge between the obsolescence of *confarreatio*, *coemptio*, and  
 is (granting for the sake of argument that these were  
 rriage ceremonies) and the institution of *instrumenta*  
*alia*; and how when these were abolished? Again, by  
 at means was this *maritalis affectio* discovered in the  
 ion of the more humbly born? On what foundation did  
 e law base its distinction between mere concubinage and  
 e honourable state of marriage? Those who hold mere  
 resent necessary say, "*concubinam ex sola animi destinatione*  
*imari oportet*;" and when the woman was of good birth  
 d reputation, no doubt her union with the man was  
 emed to be honourable. On the other hand, when the  
 man was of lowly origin the contrary presumption was  
 ld. It is scarcely possible that such a nebulous and  
 defined distinction between marriage and concubinage  
 ully existed, for it must have led to innumerable frauds  
 d law-suits. Another argument against the *nudus consensus*  
 eory is the important question of *legitimatio per subsequens*  
*trimonium*. If there was no real difference between  
 ncubinage and marriage, except what existed in the

\* *Institutiones Juris Romani Privati*, Book I., sec. 173.

minds of the parties, there was no necessity for those in that particular relation of life, called *concubinatus*, to undergo a marriage ceremony together with a drawing up of settlements, to confer a legal position on their children. In most cases, where it was of sufficient importance to contract this subsequent marriage, the position and character of the woman must have been honourable enough to raise a presumption of marriage. Of course, we must bear in mind that *concubinatus* under the Roman law was not of the same kind as modern concubinage is. It had a decided legal status, and being recognized by the law was legislated for, and the position of the *concubina*, though less honourable than that of the *uxor* or *matrona*, was not so debased as that of the "mistress" of modern days. No unmarried man could live with two concubines, and married men were forbidden to keep any at all. This state of life was deemed immoral by successive Christian Emperors, who successfully, on the whole, eradicated it out of the laity, but it lingered later, and to a considerable extent, among the clergy, though the sweeping and reckless charges brought against them by such as Peter Damiani, Hildebrand, and others cannot be supported in their entirety. But when we look into the difference between matrimony and concubinage, we find that it is an important one; in the latter there is neither dower nor settlement, and the issue of the union do not pass into their father's power except under certain circumstances. The meaning of Ulpian's phrase, "*nuptias enim non concubitus, sed consensus facit*," must be sought for in the context, and is that mere cohabitation of the man and woman is not of itself capable of creating the nuptial tie, but the consent of the proper parties that the two should live together was also necessary, as well as the surrender of the woman in such a way as to make the *concubitus* feasible, that is to say, the parties must have participated in some hymeneal solemnity. In addition



these more dry reasons, it is not probable that among such a people as the Italians, surrounded by bright skies and a laughing country, marriage, which was always deemed to be a fitting occasion for public play, should have been entered into by the simple and free consent of the contracting parties. Conducting the bride to the marriage bed, the ceremony of making her welcome at her husband's house by fire and water—this last at earlier times—the drawing up of dotal settlements, and the latter Empire marriage before an attesting priest or priestess at different periods have served to witness the consent of the parties that they twain should be one flesh. Then, finally, there was another ceremony, combining both the social and legal element, the *deductio in domum mariti*, or the bringing of the bride to the home of her husband as the headquarters, as it were, of their married life. Where the *domus mariti* was there also was the *domicilium matrimonii*; the relations of the wife to the municipal magistrate, a matter of vital importance, depended upon the locality of the home of her husband. This *deductio in domum*, a survival perhaps of the old matrimonial theory that the husband alone and violently withdrew his future wife from her family, served not only as an open notification to neighbours of the union of husband and wife, and as such was a legal ceremony to be performed in all marriages, but also by holiday displays to give an opportunity to friends and relatives to testify their sympathy and join in the festivities. We will now consider between whom marriage might be celebrated. It is of use to inquire into this, because, among other reasons, it is demonstrative of that class-spirit which was so dominant in Rome, and which was only broken by drains on her original population, to compensate for which the fictitious character of Roman citizen was given to aliens. To create a regular, or civil, marriage, *justum matrimonium*, which brought the children born in it under their father's power, there were three requisites—capacity, con-

sent, and evidence of consent. Under the head of capacity are to be reckoned *pubertas* and *jus connubii*. Consent includes the consent, under certain circumstances, of the contracting parties, of their parents or guardians, and of those whose family will be increased by the marriage. In Roman law marriage for a long time was looked upon as of two kinds, civil and gentile. The former was at first confined to Roman citizens only, then extended to privileged Latins and aliens; the latter could be contracted by all (even by Roman citizens with aliens) except slaves, whose connection\* had no legal status. Civil marriage brought the children *sub patria potestate*, but neither Gentile marriage, nor *contubernium*, nor *concubinatus* had any such effect.

The *jus connubii*, which may be translated as "no disqualification for marriage," was a very important element in matrimonial law at Rome. By pursuing a negative course of inquiry, we shall learn what persons had the right of intermarriage. There were two chief divisions of disqualification, legal and natural. Under legal comes (a.) Inequality of birth, the removal of which disqualification may be briefly sketched.

Previously to the *Lex Canuleia* there was no *jus connubii* between patricians and plebians. Down to the *lex Papia et Poppæa*, *ingenui* were under a like incapacity to contract a civil marriage with *libertini*; but by this law, the chief scope of which was to further the increase of marriage among the wealthy and luxurious Romans, all *ingenuli*, except those of senatorial rank, were allowed to intermarry with *libertinae*, provided that they were not prostitutes, actresses, or women scarred with the brand of infamy. To meet his own case, Justinian (his wife Theodora had been an actress) repealed the law preventing a man, whatever

\* This was called *contubernium*, and presents a specimen of anomaly in Roman law, which system refused to recognise its legal existence, but at the same time forbade it to be incestuous.

his social rank might be, from marrying one who had formerly practised the *ars ludicra*. By the 117th Novel, the same Emperor removed all matrimonial disabilities from those who were styled *humiles abjectæ personæ*, thus cutting down the last remaining barriers erected by the old class-spirit of Rome. (b.) The next disqualification is madness while it lasted. (c.) Physical incapacity, such as exists in the case of eunuchs, born or made, and the case of those who by some bodily defect cannot attain to puberty. (d.) Another disqualification rested on social reasons. A guardian could not marry his ward until she attained the age of 26, except she were betrothed or given to him by her father. An adulterer could not marry his accomplice, nor he ravisher the woman he violated. (e.) A further disqualification is based on political reasons. A governor of a province is prevented from marrying a woman born or residing in the province during his tenure of office, lest he should gain too much power, or be influenced by her and so neglect the interests of Rome. A Christian could not marry a Jew; this no doubt arose from the hatred evinced by the early Christians for the betrayer of their Lord.

The disqualification from natural causes is the bar placed by relationship or affinity. The broad and general rules are as follows:—No one could marry any one standing to him in the place of an ascendant or descendant; and collaterals up to the fourth degree, and *affines* could not intermarry. These restrictions varying with the times apply equally to those relationships arising out of adoption; but when this latter tie was broken by emancipation, they did not hold good, except between the adopted child and its adoptive ascendants. From the very earliest any connection between direct ascendants and descendants was regarded as incestuous; but in the earlier Empire the connection of collateral ascendants and descendants was not so regarded. This was introduced to suit the case of Claudius, who desired to marry his niece, Agrippina, his

brother's daughter. He caused the servile senate to declare such marriage legal, and his example was sufficiently imitated by the nobility at Rome. The intermarriage of collaterals within the sixth degree was at one time prohibited, but for no better reason apparently than that there were names for such relatives. This restriction was reduced to the fourth degree (this prevented first cousins from marrying); and then to the third degree, but with this anomalous distinction, that while it was incest for an aunt to marry her brother's or sister's son, or for an uncle to marry his sister's daughter, he might marry his brother's daughter. This otherwise incomprehensible rule is explained by the Emperor Claudius's case. When Christianity became the religion of the Empire, such a connection was deemed hostile to its spirit and doctrine, and was therefore abolished by Constantine. The law as to the intermarriage of first cousins varied with different Emperors, until Justinian confirmed a former constitution which had removed all obstacles. Affinity, or the relationship into which each of the married pair enters with the members of their respective families, acted as a bar up to certain grades. Accordingly a man could not marry, even if he had wished it, his mother-in-law, or daughter-in-law, or stepdaughter or stepmother. The much vexed question as to whether a man could marry his deceased wife's sister, and a woman her deceased husband's brother exercised the minds of lawyers and philosophers even in those days; for these *affines* were permitted to marry each other in the time of Gaius, and for many years afterwards, but Christianity once more altered the marriage law, and Constantine issued a constitution in which he forbade this union, which was subsequently ratified by Justinian's legislation.

We have endeavoured in the preceding pages to give a brief general outline of what a Roman marriage was, and how it might be celebrated, but have made no reference to any results of the tie, which would furnish matter for

separate discussion. We have now to consider the English marriage.

*English Law.*—It is to be feared that there is a great deal of prejudice existing in England on this subject, and that it is combined with considerable ignorance. Few persons, notwithstanding that the majority have the word on their lips every day of their life, could give a satisfactory definition of the term, and argue out reasonably from what point of view they regard the state of matrimony. We, as a nation, are not given to the thinking out of legal ideas; we desire to obey the laws if they do not gall us too much; but what are the underlying principles and causes of any particular law we do not always deign to consider. For these reasons we have a mass of conflicting undigested theories floating about, out of which each individual can choose according to his own particular line of thought, and which he can stoutly maintain because his adversary has no more firm stand point of argument than himself. As a specimen of this we may cite the versatile author of "No Name," and "Man and Wife." Can any one but a poet, writing under the impulse of his feelings, reconcile the general scope of these two books? In the former we are told that Nora and Margaret Vanstone are left penniless and without a name, because their father and mother had not had a religious ceremony read over them before the births of the two girls. This is more than a covert thrust at a religious and complicated ceremony; while in the latter work the marriage law of Scotland receives equal castigation with modern athleticism; and this because Scots law allows the tie to be contracted merely before competent witnesses, and not necessarily before a priest or other authorised officer.

Marriage, in English as well as Roman law, is called a contract, because it shares in common with ordinary commercial transactions two of the chief requisites of a contract, namely, a mutual agreement of the wills of two parties (to live together), and the notification to each other by the

respective individuals of that agreement. At this point, in reality, the resemblance stops. There are deeper feelings at the bottom of such contracts than of those of trade. They are less interfered with by the direct intervention of the law; but, on the other hand, the marriage contract cannot be dissolved at will by the husband or wife, but requires the interposition of a magistrate, which ordinary dissolution of partnership does not require. This characteristic marks a strong line of contrast between our marriage and the lax tie prevailing at Rome, from before the late republic to the early Christian Emperors.

There has not been any question in England as to what kind of contract marriage is; and this is due to the fact, that contracts in our law are not strictly classified according to the formalities peculiar to each, which is the general basis of the Roman law division. What we must now consider is, whether the law of England regards marriage as a sacrament, *i.e.*, a purely religious ceremony, or as a civil contract. There are grounds for both views, which will be succinctly stated, and a general inference will be drawn from the statement of them. There can be no danger in holding that, from the influence exercised by the Canon law, it bears a double aspect—the religious and civil. It is necessary to explain the meaning of the term “sacrament,” as applied to it. In the infancy of the Christian Church, when religious fervour was great, it seemed good to parties entering the state of matrimony to have their union blest by Heaven; the civil side of the contract was not, however, rendered any more binding by the pronouncement of this benediction. Milman,\* quoting the letter of S. Ignatius to S. Polycarp, says, that “On marriage, the Christian is taught to take counsel of the bishop. Some kind of benediction in the Church, or in the presence of the community, gave its peculiar holiness to the ceremony. . . .

\* Latin Christianity, Book III., chapter 5.

Yet the Roman citizen was bound only by the civil contract." The learned Dean then goes on to say that by degrees the Church acquired supreme jurisdiction over matrimonial questions, which, as codified in the Canon Law, survived even in England up to quite recent years. Marriage was so highly thought of by the primitive Church that it was numbered among the sacraments, or means of grace; because, in the first place, it was a check to incontinence, and was besides typical of the union of Christ in heaven with his spiritual Bride, the Church on earth. At the period of the Reformation, when the Church of England denied finally the supremacy of Rome, she at the same time professed to purge herself of certain errors into which she considered the main body of Western Christendom had fallen. She now decreed that there are only two sacraments generally necessary for salvation, and left to the individual members of her Church to hold, if they like, that the other five are necessary, but not so necessary as the two which she particularises. That she regards it as a religious service is evidenced by her incorporating in her Prayer Book an order for its solemnization. The result has been that while some hold marriage to be a sacrament, and others do not, only a comparative few deny it to be a religious ceremony, and it is in this sense that the term sacrament is here used.

The reasons advanced by those who hold it to be exclusively a religious rite are of some such nature as the following:—

(1.) Marriage is of Divine appointment, for the three purposes enumerated in our Prayer Book. Properly ordained priests are also of Divine appointment, therefore these are best able to carry out Heaven's decrees in this matter.

(2.) One portion of the marriage ceremony requires a benediction; only a priest can bless, therefore only a priest can marry.

(3.) A religious ceremony tends to strengthen and purify that union on which so much happiness or misery depends.

(4.) By the law of the land a religious ceremony was necessary in former years to make the contract of marriage a valid one.

Those who hold the civil side of the question say :—

(1.) Previously to the introduction of Christianity there were well-defined rules of marriage, and it was self-aggrandising sacerdotalism that made a religious rite at one time necessary.

(2.) The State has a right to regulate the union of its members.

(3.) The State claims a power to dissolve the marriage. If matrimony was peculiarly a religious ceremony which was wholly and solely within ecclesiastical domains, the State, *quâ* the civil side of the administration of government, would be powerless of itself to declare that a contract, with which it was not in any way concerned, should at any given time or for any given reason be rescinded or made null and void. And previously to the establishment of a Divorce Court in 1858, divorce *a vinculo matrimonii*, on the ground of adultery, was obtainable only by Act of Parliament.

(4.) By recent legislation marriage is capable of being contracted before a civil officer.\*

Those who hold the civil view argue thus. Marriage as a civil contract in the abstract may have had a religious ceremony imposed upon it. Or, again, things may have a Divine appointment and so claim a religious sanction, but not on that account are they to be made matters of faith and religion. The Creator, in the earliest infancy of nations, may have seen fit to give express directions as to the better management of society, thus saving men from the misery and risk of experience, but did not in every case lay down

\* Paley says that, during the Protectorate, marriage was made a civil ceremony in order to spite the clergy.



that such directions were to be construed as articles of religion, but rather left to the individual nations according to their characteristics and genius, the embodiment and operation of these rules, and the result of contravening such is not a religious offence entailing a divine anathema, but rather a civil tort, the repeated commission of which inevitably tends to the disintegration of society. Marriage, they own, is a state approved by Heaven ; but then they go on to prove how the Church has assumed dominion over it in a manner not warranted by the ordinary sources of revelation. Whilst Western Europe in her political and social position was most unstable, turbulent, and varying, Italy was oppressed by internal weakness and by taxes, levied for the Emperor at Byzantium, and in common with the rest of Europe was exposed to the invasion of the hordes of barbarians pouring in from the north and from the east, who made the native population drink the last dregs of despair. The civilization of Greece and Rome was slipping back into almost primeval barbarism, and the only element that availed against this backsliding, and rescued the mass of the people from utter degradation was Christianity. By the dissensions and weakness of the nations the Church grew ; what she decreed to be faith she could now enforce as such under the pain of excommunication. Her rules and regulations were followed alike by monarchs and subjects as gospel truths not to be controverted. It was at this period she advanced claims over matters purely secular ; among which was marriage ; her rules and regulations, codified in the Canon Law, were imposed upon every nation accepting her tenets. When those countries which had embraced Christianity had become settled down, and were framing laws and constitutions, and were regulating their social relations, the Church's influence would be most strongly felt, especially in these last, and her rules would be incorporated with, and form part of the law of the State. Among these was one which required marriage to be cele-

brated before a priest. This, they hold, accounts for the view that matrimony in England can only properly be entered into before one who ministers in holy things. On the other hand, whenever the Roman law had struck deeply into the social organization of the people, it was never eradicated, but formed the basis of, if not for many centuries the actual common law of, that State, and was modified only from time to time to suit the demands of improved thought and civilization. Roman law regarded marriage as a civil contract ; it was of such a nature that its inception and results affected the general body of the State, and could be regulated by provisions of the Legislature for the time being sovereign over the body of the people. Hence is obtained the double view of marriage which holds good on the Continent—a religious ceremony, if desired, carrying out a civil contract. If French or Germans wish to marry, they *must* be married before a civil officer; they *may*, if they please, add the religious ceremony. This double aspect, say its English supporters, is the legal one here, and ought to be more generally known than it is. Marriage is a contract of a civil nature, the performance of which is certainly carried out in ordinary cases by means of a religious rite, and is one which the State can regulate. They argue that if, for instance, during the next Session a Bill became law to the effect that first cousins could not marry, the future union of those standing in such relationship, though solemnized by a priest, would not be held valid. As to the State in former days having required that all marriages should be solemnized with the rites obtaining in the different religious communions, it was due to the fact that every organised society feels the importance of marriage both socially and legally, and desires that those events in life on whose results depend so completely the well being and proper status of all, should be testified by such ceremonies and such witnesses as to make it certain that they had been entered into legally, and not clan-

destinely or temporarily. As to the benediction of a priest, they say marriage is a holy state, and if deemed necessary the blessing of heaven should be invoked on the union; but this is paralleled by what is done on going on a long journey, or to war. God's grace is called down on our battalions when engaged against the enemy, although they may be on the wrong side, just as the priest pronounces a benediction over a couple who may have joined themselves together with sordid or unholy views. The necessity for marriage before a priest arose from the rude state of the times. The church, after apportioning out lands for dioceses under *episcopi*, subdivided these for better rule into smaller districts, *parochiæ*, under *parochi*, or parish priests. This *parochus* was generally the only lettered man of his district, and was the head of all matters, whether concerning war or peace, and was the chief repository of facts and events that occurred within his knowledge and district. Though this *parochus*, before whom the ceremony was to be performed was in holy orders, according to the Canon law he was originally intended to be only the witness of the union of the contracting parties.\* Perhaps the espousing couple sufficiently celebrated the sacrament in themselves when they mutually declared to take each other for better or for worse during the time of their natural lives, and all that was required of the *parochus* was to be witness of the espousals, and to be the repository of the fact; in reality he was there in an attesting and not ministerial capacity, but by degrees assumed the latter functions. That the priest served as a quasi district registrar in those times is proved by the husband at the marriage

\* The ecclesiastical view that marriage is a sacrament does not necessarily call for the action of a priest. In the language of theology sacrament does not connote priest, sacrifice does. Therefore it is the doctrine of the Western Church that a lay man or woman may baptize, but that only a priest can consecrate the Eucharist. This distinction could admit the validity of marriages performed by a civil officer without deciding the point whether the benediction in the marriage service is one that only a priest can pronounce.

taking him to witness that he dowered his wife of such and such lands, either specifying them, or generally describing them. This was done that the *parochus* should be enabled to testify exactly to what the widow was entitled in the event of a dispute on the subject.

Finally, the supporters of this view argue that the State in England claims direct control over marriage; and they adduce two reasons, exclusive of divorce.—(a) The marriage ceremony must be performed in a licensed or authorized place. This license implies a permission granted by the State for the purpose of holding marriage ceremonies. This licensed place need not necessarily be a church, because dissenting houses of prayer, which cannot be called churches, can be and are licensed for this purpose; and while in no church which is not licensed can such ceremonies be performed, they may be in these more irregular buildings, and with any service that pleases the scruples and fancies of the worshippers. If the couple about to marry wish their nuptial rites to be solemnized at any particular time or place, by paying a considerable sum of money to either Archbishop, they may obtain a license to that effect. Publication of the fact of marriage is amply secured by the provisions of the law on the subject. (b) Marriage is capable of being contracted before a civil officer. Although this is very important as to the civil view of the question, yet it is hardly worth while to do more than state that by 6 and 7 William IV., c. 85, the officer, called the superintendent-registrar of a district, has the power conferred on him of marrying any couple who are not legally disqualified, and who declare their intention of marrying; and, though there may not be any religious ceremony performed over them, his certificate that they are married man and wife is sufficient in the eye of the law. This statute did away with those marriages to which a factitious fame was given by the fact of their being celebrated by the Gretna Green Blacksmith. They belonged to the category of "clandestine matrimony" in the classi-

cation of Sir George Mackenzie (Institutions of the Laws of Scotland) because not celebrated "*in facie ecclesiæ*" after the proclamation of banns. But they were, down to the passing of the Act of William IV., perfectly valid marriages in Scottish Law, and it is the requirement of residence for twenty-one days which alone put an end to the romance ofelopements.

The foregoing may be a sufficiently fair statement of the claims put forward by both sides, but it is not very easy to determine accurately what is the exact view held by English law as to the nature of the marriage contract, because in proportion as the Church and State are intimately blended, so is it difficult to say which element here predominates. On the Continent, where the temporal and spiritual governments are not united, the matrimonial question is removed out of the domain of doubt, for the State has declared it to be of a civil nature and so under its supervision, and makes any religious service to be optional but not necessary.

The *jus connubii* in our legal system is of very wide extent, and we have scarcely any parallel to the social and political barriers that we find in Roman law. Natives and aliens, Christians, Jews, Turks, Infidels, and heretics may all intermarry, and there is nothing to prevent them; and we know that it is not an uncommon thing for gentlemen in high position to exalt from the basement to the drawing-room those who have ministered to their bodily wants. There are two kinds of disabilities, canonical and civil; the first making the contract voidable; the latter, void *ab initio*. The canonical disability is incapacity to procreate. The civil disabilities are (a) a prior marriage; (b) want of reason; (c) proximity of relationship by consanguinity and affinity; (d) want of age. There is one other limitation of the *jus connubii* in the case of the descendants of the body of his late Majesty King George II., who are incapable of contracting matrimony *without the previous consent of the reigning*

*sovereign*.\* As the Canon Law incorporates a great amount of Biblical and Roman Law we shall find that the prohibited degrees are now-a-days almost the same as those in the times of the later Roman Empire. The prohibition is based upon nearness of blood and nearness of relationship entered into by marriage; this last is confined only to the parties to a marriage, and does not exist between their respective relatives; a man may not marry his wife's sister, but there is nothing to prevent his brother from contracting a marriage with her. On looking over the Table of Kindred and Affinity, we see that marriage is prohibited between ascendants and descendants *ad infinitum*; but collaterally only as far as the third degree;† thus by the letter, if not by the spirit of the law, a man might, were he so disposed, marry his great aunt. The prohibition of the connection of *affines* in our law is also the same as that which existed in the Roman Law after Christianity became the religion of the Empire, and through which such unions as between uncle and niece, and brother-in-law and sister-in-law were pronounced to be contrary to morality.

In conclusion, we will sum up the preceding observations. Among the Romans, marriage, whether of the category of real or consensual contracts, was of a civil nature, akin to ordinary commercial transactions, and in no sense a religious rite. The most important ceremony or formality that testified to the bargain was the *deductio in domum*

\* 12 Geo. III., c. 9. By section 2 those of the royal family who, being over the age of twenty-five, wish to contract a marriage disapproved of by the sovereign, may give notice of their intention to the Privy Council; and twelve months after may contract a valid marriage, unless both Houses of Parliament within such twelve months expressly declare their disapprobation of such intended marriage.

† To find out in what degree any two people stand to each other, the common ancestor of both must be found, and the intermediate persons, if any, up to and down from the common ancestor (including the person whose degree to the one or the other side of the column is wanted) reckon each as a degree. Thus, uncle and nephew stand in the third degree to each other; first cousins in the fourth, and second cousins in the sixth.

of the woman. In early times, and among the nobler  
classes, the result of the marriage was to bring the wife  
complete subjection to her husband; but at no very  
period she obtained considerable liberty, and, finally,  
in her person and property completely independent of  
husband; which liberty by the time of Juvenal had, in  
many instances, developed into unbridled licence. The  
woman to marry was, if we may use the expression, very  
valuable; and it took centuries of disintegrating influences  
to break down the barriers that hampered and  
prevented free intermarriage. Though there exists among  
a large and important section which regard marriage as  
merely religious rite, and completely ignores its civil side,  
it cannot be doubted for a moment that the State regards  
it as a purely civil bargain, over which it is competent to  
exercise its unfettered control. On reflection this will be  
found to be natural, for from marriage flow so many im-  
portant results other than those of a religious or spiritual  
character; and it is not too much to say that upon  
marriage, to a large extent, depend the security of property,  
the well ordering of Christian communities. While we  
have not had the innumerable bars to free intermarriage to  
 contend with, the position of our wives in this present  
country is much less independent than that of the Roman  
women in the later times. The theory that they twain are  
one flesh, which flesh is the husband's, still largely obtains;  
notwithstanding recent legislation in favour of married  
women, their position is not yet materially altered. Lastly,  
I should not wish anything in this article to be taken as  
denying the "holy state" of matrimony, or its divine  
origin; our aim has been to show that the contract, as  
affecting persons other than those entering into it, concerns  
society and the ordering of the community, and is therefore  
in the province of the State, as representing society.

W. P. EVERSLEY.

## V.—AMENDMENT OF THE BANKRUPTCY ACT

(1869).

**T**HE last nine years have disclosed many defects in the present Bankruptcy Act (1869). How far these defects can be remedied will be considered in this article.

The Statute of 1869 is primarily applicable to England, and not to Scotland or Ireland. No doubt the Scotch or Irish property of an English bankrupt may be dealt with under the Act; but, considering the very intimate commercial relations of the United Kingdom, the time has arrived for making one bankruptcy law applicable to the whole of Britain and Ireland, and also to India, and also all those Colonies which have no independent Legislatures of their own. To have different statutes for the three kingdoms is as inconvenient and absurd as if there were different acts for Liverpool, Manchester, and London. To provide for the difference in procedure under an act for the United Kingdom would not involve any insurmountable obstacles.

Sections 6th and 7th lay down the grounds for an adjudication in bankruptcy, and specify the acts or defaults which are to be deemed acts of bankruptcy. These sections, and the corresponding sections of previous acts, have caused much needless litigation and useless expense to creditors on bankrupt estates. These sections ought to be repealed, and adjudication in bankruptcy should be allowed in all cases where the bankrupt himself, or one or more of his creditors, could show to the Court that the debtor's estate was insufficient to pay all the debts in full. Conveyances or assignments by a debtor of his whole property for behoof of his creditors, and fraudulent preferences, might then, as from a certain number of days—say 60 days, or 3 months—before the adjudication, be declared null and void. The law as to fraudulent preference has been the subject of much



cent discussion ; and, in particular, was elaborately considered by Mr. Daniel, Q.C., in a paper which he read at the meeting of the Social Science Association held at Liverpool in 1876. This point, from the almost utter impossibility of proving fraud, is beset with serious practical difficulties. Mr. Daniel appears to suppose that the Legislature should hinder an insolvent debtor from paying a friend to whom he owed a sum of money ; but I do not believe that any good purpose would be served by such an investigation of the debtor's affairs as Mr. Daniel's proposal involves. Unless the bankrupt estate, or a portion of it, has been made over to a friend, or a person in the debtor's confidence, who really holds it in trust for the bankrupt himself, the best thing which can happen for the creditors, is a speedy realization of the assets belonging to and in the possession of the bankrupt as at the date of the adjudication, and then an equal division of the proceeds amongst them. Fraud, and every other form of dishonesty, can be better dealt with by the Criminal than the Civil laws. Fraudulent preferences are specifically treated in Section 92nd ; but with no beneficial results as regards creditor. Looking at that section, with its elaborate enumeration of instances of fraudulent references, which are illegal and void as against the trustee in bankruptcy, one might almost suppose that the Legislature had become virtuously indignant at the dishonesty of paying or giving security, within three months of bankruptcy, for debts previously incurred ; but the last three lines of the section at once dissipate such a transcendental notion, and protect purchasers, payees and incumbrancers acting in good faith, and who are creditors for valuable consideration. The section is neither more nor less than absolutely useless, and ought to be repealed. Some have thought that our commercial morality would be raised and purified by more stringent regulations against preferences being given to some creditors ; but, until all payments or securities granted within a certain period of bankruptcy are illegal, the law of

fraudulent preference will be a dead letter. This sweeping amendment is neither just nor politic.

The 8th Section treats of proceedings in bankruptcy. Bearing in mind what has been already suggested as to the grounds of bankruptcy, the proceedings on the petition would be proof of a debt to the extent of £50, and of the debtor's inability to make payment. If a debtor can, and does prove these two things, he should at once be adjudicated a bankrupt on his own petition; and, if a creditor can and does prove them, adjudication in bankruptcy should be awarded after the lapse of a sufficient number of days subsequent to the service of the petition on the debtor personally, or at his last or best known place of business or dwelling-house, or of service in such manner as the Court may authorise. Whether an insolvent person is a trader or not, ought not to affect the right of the insolvent to be relieved of his debts, or of the creditors to insist upon an equal division of the insolvent's estate. As a protection against the malicious presentation of a petition of bankruptcy, the law as to maliciously taking legal proceedings should be strictly enforced. Taking the number of bankruptcies wound up in 1876 as a criterion, there cannot be much doubt as to the propriety of winding-up all insolvent estates where a creditor cannot get payment of a just debt, and the debtor refuses, or is unable to show that an adjudication of bankruptcy ought not to be awarded against him.

Section 10.—The appearance of a notice of adjudication in bankruptcy is conclusive evidence of bankruptcy. There must be some general test of the adjudication, and the one long ago adopted, and consecrated by time, is as good as, if not better than, any other that can be substituted in its place. As a matter of fact, however, this notice never comes to the knowledge of many of the creditors till they have received numerous communications from those who wish to be appointed trustees on the bankrupt estate; and, therefore, a useful provision would be to compel the debtor,

at as early a date as possible, to communicate the adjudication to all the creditors and also to intimate the probable amount of liabilities and assets. It is desirable that this intimation should be given on the day when the notice of adjudication appears in the *Gazette*.

Section 11.—The 11th Section defines the commencement of bankruptcy, and contains the doctrine of relation. It involves some of the most vital points in the whole law of bankruptcy. Having already proposed the abolition of all acts of bankruptcy, unless the adjudication itself, the necessary logical consequence is that the commencement of the bankruptcy should be the date of the adjudication, and the doctrine of relation back should be abrogated. This doctrine is important in regard to the law of fraudulent preference, and so far as that doctrine ought to be maintained, the Legislature should simply declare that, within a fixed period, all fraudulent preferences should be null and void. This section is practically useless. It is simply a remnant of the old statute law of Elizabeth's reign, to the effect that, from any act of bankruptcy, the bankrupt was absolutely deprived of all power to charge or dispose of his property to the prejudice of his creditors.

Section 14.—The rules for the appointments of trustees are here laid down. Much controversy has arisen on these subjects amongst official persons and commercial men. The former propose to place all bankruptcies under official management, and would abolish the office of trustee as useless. There cannot be the slightest doubt that, at first sight, a system of pure official administration would be the best and most economical; but a highly organised system of State management would be sure to engender, as formerly, many huge abuses. Therefore it is not strange that mercantile men, who have by far the greater stake in the law of bankruptcy, do not appear to approve of this opinion. Numerous resolutions are to be proposed for the consideration of the Association of the Chambers of Commerce of the United

Kingdom for this year; but not one of them has reference to the abolition of trustees. More than this, it is the duty of creditors to obtain payment of their claims against debtors on their own responsibility and at their own cost, and the State should not be authorised or encouraged to undertake this duty under any circumstances. The realization of insolvent estates by means of trustees must therefore remain part of the law of bankruptcy.

Connected with the appointment of trustees is the election of a committee of inspection. This election is not compulsory, and may be dispensed with; but, as experience has shown that the duties expected to be performed by the committee of inspection are almost invariably neglected, it would be better to throw all responsibility on the trustee in realizing the bankrupt estate according to fixed rules, or in compliance with the wishes of the creditors themselves. Payment to committees of inspection for every attendance at a meeting would not be a sufficiently strong inducement to committees to give much more regular attendance than at present. The auditing of the trustees' accounts, supposed to be made by the committee of inspection, would be much better done by properly qualified accountants appointed and acting as the assistants of the head of the department for the administration of bankruptcy proceedings. The duty of these inspectors would be analogous to those performed by the inspectors of bank agencies; and full power should be given them to examine, audit, and report upon all accounts in bankruptcies of every kind, and without any exception. If committees of inspection ought to be maintained, the appointment of official inspectors is still required, and would greatly diminish the extravagant costs of realizing and administering all insolvent estates. These costs are a real blot in the administration of the law of bankruptcy, and will never be materially diminished till the whole costs and expenses in the management of estates which come before the Court are all placed

nder officials who can compel trustees to keep separate bank accounts for every bankrupt estate under their management, to pay into such accounts all sums they have in hand above a small amount, and draw cheques for all payments, and to save their own and all other costs, charges, and expenses incurred in managing and winding-up the bankruptcy taxed and approved of, before they can get their discharge. The amount at present lost to creditors is enormous, and the amount which would be saved by bringing the accounts of all insolvent estates, which are dealt with by the law of bankruptcy, under official control, would more than amply repay any extra expense which might be incurred, and ought to be imposed on bankrupt estates by way of percentage, or the like.

Section 15.—This section explains what property is divisible amongst the creditors of the bankrupt, and what are not. It does not appear to call for any observation unless in so far as it comprehends the doctrine of reputed ownership as to goods and chattels in the possession, order, or disposition of a trader who has become bankrupt. When the Act of 1869 was debated in the House of Commons, the present Master of the Rolls condemned the doctrine as the result of an accident. That the creditors of a bankrupt should divide amongst them the proceeds of the property of some one who was not, and never intended to be a creditor, is anomalous and unjust. The rights of creditors ought not to be greater than those of the debtor; and the efforts made by the Legislature to provide remedies against the improvidence and the thoughtlessness of creditors themselves are unfair to a victimized owner, and is based on the vicious principle of dividing amongst a class what exclusively belongs to some other person. Where the owner has given a man the right of dealing with his property by sale or consignment, he has no right to proceed against those who have *bonâ fide* dealt with his agent; but where specific property, capable of

identification, and belonging to a third person, happens to be in the hands of a bankrupt, it ought to be restored to the real owner, and it ought no more to be subject to division amongst the creditors than property to which a trust attaches. The reputation of ownership should not deprive the real owner of his right of ownership ; much less ought the circumstance, that the bankrupt has taken upon himself the sale or disposal as owner, give his creditors the power to enlarge their dividends at the expense of innocent people. In the 5th sub-section there is a proviso that the doctrine shall not apply to book debts ; but, in the case of *Cook v. Hemming*, 3 C.P. 334 ; 37 L.J., C.P. 179., where a contract had been made for supplying butcher's meat to an asylum, and the contract was wholly performed by an assignee under the contract, and the original contractor having become bankrupt, it was held, Willes J., dissentient, that the debt due from the asylum was within the order and disposition of the original contractor. The exemption in the proviso has evidently been made on the supposition that there could hardly be reputed ownership where the property was not visible and tangible by the outside public ; but a deeper principle should lie at the bottom of such legal relations, and that is that the property of every man should be restored to him, and that all involved in a common loss should bear it equally and without being entitled to share amongst them what, in point of fact, did not belong to the insolvent debtor. Numberless cases have arisen out of this sub-section with more profit, it is to be feared, to lawyers than creditors ; and the circumstances which, by judicial decisions, have been held to negative the consent of the true owner, as to his allowing the goods or chattels to be in the disposition of the bankrupt, may well raise a doubt as to the practical commercial value of an enactment, which was made to punish those who allowed their goods and chattels to be in the hands of persons whose apparent wealth enabled them to get into debt with the

general public. The value of the enactment cannot be known; but its opposition to the plain doctrines of morality and common honesty should bring about an early abrogation of the enactment. This rule, as to reputed ownership, has been really left to be interpreted by juries; and the result has been that, like a house which has been transformed both internally and externally, it is hardly possible to recognise the original structure.

Section 17.—By the 6th sub-section, votes may be given either personally or by proxy. There cannot be a doubt that the activity of those who wish to be appointed trustees on bankrupt estates has not increased the dividends of creditors; but, although various proposals have been made to diminish this activity, there does not appear to be any feasible way of eliminating the abuses which it has engendered. It is, of course, rather hard that the supineness of creditors has brought about the abuses condemned; but why a creditor should be compelled to leave his business to attend meetings of the bankrupt's creditors, or why he should be deprived of appointing a representative to act in his name, is not easy to see.

Section 30.—This section enacts that trustees shall pay all sums of money in their hands into such banks as shall be appointed by the creditors or into the Bank of England, and declares that they shall pay 20 per cent. per annum on all sums kept in their hands for more than twenty days, and that they shall be liable to dismissal from office in consequence of failure so to do. How this enactment is carried out will be understood from the 7th Table annexed to the Comptroller's Report for 1876. Thence it would appear that the balance of payments in the hands of trustees on 31st December, 1876, amounted to the large sum of £441,364 2s. 10d., and that the sum appearing as consigned in the Bank of England, at the same date, was £10,784 18s. 5d. The Comptroller complains of this former gigantic sum being allowed to remain in the hands of

trustees, and suggests that separate bank books should be kept by trustees for each bankruptcy. Further, basing his calculations upon the accounts which must be submitted to him, and those under liquidation by arrangement and agreements for composition, he arrives at the conclusion that no less than four millions of money are under the control of trustees, who have an almost unrestricted power to use these enormous sums very much as they please. This is a state of matters which is intolerable, and would be entirely annulled by the system of official inspection already suggested, and made applicable to all bankruptcies, liquidations by arrangement, and compositions. To give some idea of the stupendous and multitudinous transactions involved under the law of bankruptcy, it may be stated that the bankruptcies in the year 1876 were 976; liquidations by arrangement, 4,986; and compositions with creditors, 3,287; and that the total liabilities for 1876 amounted to £20,873,349, and the assets to £6,165,458. Another important feature of the law of bankruptcy is that the bankruptcies since 1870 have diminished fully one-third, that liquidations by arrangement and compositions with creditors have been more than doubled between 1870 and 1876. Clearly the public are dissatisfied with the administration of insolvent estates under the bankrupt law proper, or some unfair or unfortunate influences are at work to induce creditors to agree to liquidation or composition. The cause has been attributed to the unjustifiable use of proxies. If this should be the real cause, no remedy can be applied by the Legislature with much hope of success, since the creditors choose to injure themselves. But, if this cause is not the true one, there is no escape from the alternative that creditors find their own advantage in agreeing to liquidation or composition. The truth is, the distinction of bankruptcy and liquidation by arrangement should cease, and the procedure under bankruptcy proper should be abolished, and liquidation by



arrangement should alone exist ; or, what is my point of view, liquidation should be abolished and bankruptcy simplified. In no case should a bankrupt be exempt from public examination in Court. Whatever may be the real cause for this preference, there is no ground for allowing trustees, or creditors, or their proxies to vote on liquidations or compositions without being under the restraining hand of officials whose duty would be to see the regular keeping of books of payments and the punctual payment of all sums into bank, and the taxation of all accounts in the administration of the insolvent estates. To enforce such a duty which the Legislature owes to the general public is based on the elementary principles of the bankruptcy ; that is to say, that, when a debtor is required to pay all his debts in full, and the law allows him to do so on payment of a part, the bankrupt estate should be dealt with as a prudent man would deal with a solvent estate.

Section 37.—This section refers to proof of distinct contracts, and gives a creditor the right to prove against the estate of one who is a sole contractor, and also against the estate of one who is joint as well as sole, also on the estate of a partner, if he is a member ; but the general rule in ranking is that a creditor cannot prove against the estate of a partner in a firm and also against the separate estates of the other partners. If the debt is a partnership-debt the creditor can prove against the assets of the partnership ; and if the creditor is an individual partner, against his separate estate as well as against the partnership estate. This is not the rule in Scotland, for a creditor of a partner may prove against the assets of the partnership as well as against the separate estate of the partner, setting a value on what he expects to receive from the partnership, and from the individual partner. He may claim the balance due to him from the solvent or insolvent estates, as the case may be, of the individual partners. That the laws of

Scotland are not the same will surprise some of our readers ; and may, in some instances, involve serious loss to a creditor on this side of the Tweed. The difference of principle here noticed arises, doubtless, from the law of Scotland looking at the debt of a partnership as, in its nature one of joint and several liability ; whereas the law of England looks at such debt as in its nature one of joint liability only.

Section 47.—By this section, the bankrupt is entitled to the surplus remaining after payment of his creditors, and of the costs, charges, and expenses of the bankruptcy. This is quite right so far as it goes ; and experience has disclosed that there is reason to believe that large sums of money as unclaimed dividends remain in the hands of trustees are never accounted for. Therefore this section should have proceeded to enact, that, in every case of bankruptcy, liquidation and composition, all sums in the hands of trustees after a certain period, and before their discharge, should be paid over to some public official, who would, on application to a court of justice, be liable to pay any unpaid dividends, and, after a certain date, to pay any balance in his hands towards the reduction of the national debt.

Section 49.—The discharge of the bankrupt is a point upon which much argument has been expended. By the present law, it may be given by the Court when the bankruptcy is closed, or at any time during its continuance with the assent of the creditors by a special resolution ; but it cannot be given unless a dividend of 10s. in the pound has been, or might have been paid out of the property of the bankrupt, or unless the creditors declare that by circumstances for which the bankrupt is not responsible, the assets of the bankrupt have not yielded 10s. in the pound. The bankrupt is also to be deprived of his discharge if he has made default in giving up his property for behoof of his creditors, or if a prosecution has been commenced against

him under the "Debtor's Act, 1869." Arrangements which have been made under this head, no discharge should be granted, unless by satisfaction of the creditors, until a dividend of 1s. has been paid; and (2), that no discharge should be granted until all the debts are paid in full. It is desirable that all should be impressed with the necessity of satisfying their creditors' demands in full, and that no obstacles as possible should be interposed in the way of making the law of bankruptcy to be made the means of releasing men from their just debts, and of placing property at their disposal, or within their reach, for little or nothing for division amongst their creditors. It is nothing unreasonable in either of these proposals. Which of them should be adopted by the Legislature is suited for determination by mercantile men. To raise the necessary dividend to the utmost possible as an essential condition for a discharge is in the interests of the general community. Statistics of the Comptroller for 1876, Table No. 1, show that, out of 554 estates closed in bankruptcy that year, 82 yielded no receipts whatever, 192 yielded the amount of £340,437, yielded £52,846 in dividends, and, after paying the sums necessary for carrying on business, and paying secured or preferential creditors, gave £17,403 as the balance for division amongst the general body of creditors, who, in consequence of the satisfaction and distribution amounting to 96 per cent. of the assets, received no dividend whatever. Of the liabilities to the amount of £325,314, yielded by the estates for carrying on business, completing contracts, and paying secured or preferential creditors, as assets for division amongst the general body of creditors, the sum of £259,439 was paid in paying costs of realisation and distribution, leaving £194,439 available for division amongst the general body of creditors. These results are startling evidence of the

regards one-sixth, no blame can be cast on the administration of the law of bankruptcy, and as regards nearly one-fourth, the important fact is, that the costs of administration appear to be out of all proportion to the work done, and may well raise doubts in the minds of creditors how far any law of administration in bankruptcy can do them much good. Another fact disclosed by the 8th Table is that of those 278 estates paying a dividend, 247 did not yield 10s. in the pound, and only 31 paid the dividend indicated by the Legislature as a conditional minimum for the discharge of the bankrupt. Again, of these 278 estates, 60 paid a dividend not exceeding 1s., 66 not exceeding 2s. 6d., 66 not exceeding 5s., and 38 not exceeding 7s. 6d. With such figures, there is no difficulty in arriving at the conclusion that the estates administered under the law of bankruptcy are not favourable specimens of a satisfactory condition of commercial morality. The payment of higher dividends must be sought for in other measures than in the administration of the law of bankruptcy. Reckless speculation must be abandoned or severely punished; extravagant personal expenditure must be diminished, or a public stigma cast upon it; and the advantages of the public law of bankruptcy should be chiefly, if not exclusively, conferred upon those who have been overtaken by misfortune or unavoidable calamity.

Section 59.—The law of bankruptcy is administered by the London Bankruptcy Court for the metropolitan district, and, unless the proceedings are removed, by the District County Courts for the provinces. The judge who is to preside over the London Bankruptcy Court is a judge of the High Court of Justice, section 61; but he and the County Court judges have power to delegate their authority to the registrars of their respective courts. This power of delegation ought to be abolished. Where judicial work is to be done, it ought to be so by a judge, and none else. This delegation is a fruitful source of expense, in consequence of

the dissatisfaction of litigants, and the necessary multiplication of appeals. The extension of the jurisdiction of the County Courts to bankruptcy is well fitted to bring about a speedy administration of justice, and the chief amendment which requires to be made on this branch of the law is that an appeal from the County Court judge should not be, as now, to the Chief Judge in Bankruptcy, but to the Lords Justices of Appeal. This is an alteration proposed by the Committee lately appointed to consider the working of the Bankruptcy Act, 1869, and would not impose much heavier burdens on the Lords Justices than the bankruptcy appeals impose upon them under the present system. The appeals to the Chief Justice in 1874 were 107. Of these 22 were withdrawn, and 21 were appealed from the Chief Judge. Consequently the probable extra number of appeals to be heard by the Lords Justices under the proposed new system would be 64. But further, a still more radical change is desirable in the administration of bankruptcy. What the County Courts are able to do for the provinces, the Metropolitan County Courts can do for the metropolis. The administration of the law of bankruptcy involves nothing peculiarly abstruse or condite. The whole of it, so far as any special State supervision is concerned, ought to be reduced to the simple enforcement of the duties falling upon trustees in realizing the estates of the bankrupt, and dividing the proceeds amongst the creditors according to their several legal rights and priorities, and keeping statistics as to the results in bankruptcy proceedings. Any other organized State system is a mistake and blunder, and leads to useless, protracted, and expensive legal proceedings. Where the trustee does not act justly towards a creditor, or any other person having, or claiming to have, a right against the bankrupt estate, an appeal should be made, in all cases, to the ordinary Courts of Justice. In consequence of the peculiar facilities once accorded to creditors by the Court of Chancery in winding-up estates, there seems to be some delusion in the minds of

a great many people that the Court of Chancery is the division of the High Court of Justice to which bankruptcy proceedings most appropriately belong. This is a great mistake; but, in this instance, as in most cases, after the cause or reason of a thing has long ceased, men act as if the old cause was still in existence. To what would these considerations necessarily lead? Nothing more nor less than that the Chief Court in Bankruptcy should be abolished; that the County Courts should have jurisdiction in all cases within their jurisdiction; and that the High Court of Justice should have jurisdiction in all bankruptcy cases which did not fall within the jurisdiction of the Judges of the County Court. The Comptroller's General Report for 1876 shows that the adjudication in bankruptcy in the London County Court were 294, and in the County Court 682. Of the former, 111 were non-traders, and 183 traders: and of the latter, 129 were non-traders, and 553 were traders. These figures are worthy of consideration, both as regards the character of the bankrupts and the number of cases which would require to be dealt with if the Chief Court in Bankruptcy were abolished. Another interesting Table (6th) of the Comptroller's General Report shows the bankrupts' liabilities and assets for the year 1876. For the London Bankruptcy Court the liabilities were £1,896,028, and the assets £208,436, or the former were nine times greater than the latter; whereas, in the County Courts, the liabilities were £1,937,495, and the assets £309,917 or the former were only six times the latter. Almost all bankruptcies in Scotland are carried on before the Sheriff Courts, which, as regards bankruptcy, have as extensive jurisdiction as the County Courts in England, and as regards Civil Courts, a much more extensive jurisdiction; and there does not appear to be any reason to fear that the extension of the jurisdiction in bankruptcy to the English County Courts, and the abolition of the Chief Court in Bankruptcy, would be followed by any more terrible

consequences than simplicity in procedure, diminution of expense, and larger dividends to the creditors. These are results which might well be tolerated. One great fundamental principle as to bankruptcy ought ever to be kept in view, and predominate over all others. It is, that the trustee is substituted for the bankrupt in the distribution of the bankrupt estate equally amongst all the creditors; that the trustee acts as the agent of the creditors; and that the intervention of a Court of Justice in any shape or form in bankruptcy proceedings should be reduced to a minimum. As the law now stands the Court is everything, and much needless expense is the consequence. If, however, the present Court of Bankruptcy in London be maintained, its judicial functions ought to be enlarged so as to comprehend the winding-up of all private partnerships and Joint-Stock companies; and this duty should be discharged by the supreme judge, whose whole time, if necessary, should be devoted to the work of his Court.

Section 87.—Instead of this section, it should be enacted that, after knowledge of a petition in bankruptcy, no person, sheriff, high bailiff, or other person, should be at liberty to pay any money, or deliver any property belonging to the person against whom such petition shall have been presented; and that, by virtue of an adjudication in bankruptcy, liquidation by arrangement, or agreement for composition, all money and property shall be part of the insolvent estate. There is no valid reason why any distinction should exist between debts above or below £50; and the rule here suggested to prevent any hardship arising from creditors of small claims being deprived, for any length of time, of the money to which they are entitled, after effective legal execution and sale have been obtained, would be sufficiently effective.

Section 91.—This section refers to the avoidance of voluntary settlements, and places a settlement of property made by a trader before, and in consideration of marriage

in the position of an ordinary debt contracted for a valuable consideration. Many shameless frauds have been perpetrated upon creditors in consequence of this law. Why a wife, or her trustees, should be allowed to reap the fruits of a husband's fraud, which in some cases have almost approached to theft, shows how favourably the law of England has looked upon the claims of a married woman. But, where a man has no property of his own at the time of his marriage, he has no right to dispose of property, of which he has obtained fraudulent possession, in such a manner as to place his wife or children in as good a situation as a creditor who has advanced, lent, or sold his property in the way of trade. The amount of a wife's unsettled contribution to her husband's estate should be a full legal debt; but a man before his marriage ought not to be allowed to settle more on his intended wife than the half of his clear property. To that extent, and to that alone, the law of bankruptcy should protect provisions in marriage settlements in favour of a wife and children. This rule, or one based on a similar view of ante-nuptial settlements, as here enumerated, would compel men to be on their guard against making highly unjustifiable appropriations of other people's effects, and would, in the end, prevent a great deal of domestic unhappiness.

The remaining clauses of the Act of 1869 have reference to liquidation by arrangement and composition. So far as these have any practical bearing on the administration of the Court of Bankruptcy, all that can be suggested by way of amendment has already been indicated. Creditors should have the most ample power to arrange with their debtors for the settlement of their debts, as they think best for their own interests; and so long as this principle is carried into execution, the Legislature should not interfere. But, since it has been shown that, from some cause or another, insolvent estates are wound up under liquidation by arrangement and by agreements for composition, and as



these seriously involve the interests of the creditors of persons whose interests, from one cause or another, have been neglected, it appears to be quite reasonable, according to proper legal principles, that the officials appointed by the Legislature to supervise and control the administration of the law of bankruptcy, should also have full power to investigate the whole dealings of creditors, and to act on their behalf, with the property of bankrupts. Especially, it would greatly contribute to the interests of the dividends payable to creditors in liquidation, that all accounts for realisation and distribution should be submitted to, and be approved of by the Controller in Bankruptcy.

This must suffice for our consideration of the Bankruptcy Act, 1869. On a branch of the Law of Bankruptcy, I now intend to make a few observations.

By the Debtors' Act, 1869, unless in certain cases, imprisonment for debt is abolished. On the whole, it is desirable that there should be no exceptions to this rule. These exceptions apply to poor people who are unable to pay their debt with tradesmen; while debtors for large sums are allowed to free themselves from their debts by a composition or liquidation, or composition. Were the exemption from imprisonment abolished, thrift and frugality would be increased amongst the general community. As far as property of all kinds is concerned, it should be subject to seizure and sale in satisfaction of debt, whether the debt is great or small. To throw a man into prison is, in many cases, to throw him into a debt upon the prison rates, and his wife and children into a workhouse. Imprisonment for debt should be abolished in every case. It is unworthy of a free state to allow a creditor to continue, the creditor should, at his own expense, take the debtor in prison.

This article must be brought to an end. I now propose to discuss the chief amendments which appear to be required in the Bankruptcy Act, 1869.

of bankruptcy should be the same in England, Scotland, and Ireland; and, if possible, in all the British colonies and dominions. Acts of bankruptcy should be abolished, and a debtor's inability to pay his debts in full should be the sole ground for adjudication in bankruptcy. The law of fraudulent preference should be modified, and a fraudulent debtor should be severely dealt with by the criminal law. There should be no distinction in the law of bankruptcy between a trader and non-trader, and a debtor's summons should not be considered as an act of bankruptcy. Bankruptcy should begin from the state of the adjudication, and the legal doctrine of relation should be abrogated. Official control and supervision should be purely administrative, and the chief official in bankruptcy should have qualified accountants as his assistants to examine the accounts of trustees and receivers on the spot, call for vouchers, and see that, unless those authorised by law, no charges are allowed. Committees of inspection should be abolished as useless. Reputed ownership as a part of the law of bankruptcy should be repealed. Proxies must remain. Trustees should be obliged to consign all monies received by them into banks in the name of each bankrupt estate under their management. There should be no distinction between bankruptcy and liquidation by arrangement. The law of England and Scotland as to ranking on joint and separate estates should be assimilated. All sums in the hands of trustees or receivers, as soon as a bankruptcy is closed, should be handed over to the Treasury. The payment of a higher dividend than disclosed by the results of recent bankruptcies should be enforced. The London Court of Bankruptcy should be abolished, and the Metropolitan County Courts substituted in its place; or if the London Court be retained, its jurisdiction should be extended so as to comprise the winding-up of all private partnerships and joint-stock companies. All appeals from inferior judges should be made to the Lord Justices of Appeal.

the common law as to payment after sale should be allowed free course, and simple petition in bankruptcy should be a legal step to an execution creditor. The law of voluntary assignment, which a bankrupt now makes a settlement of his property in favour of his intended children, should be altered. Official control in bankruptcy should be extended to arrangements by arrangement and agreements for composition by official inspectors, already suggested, should have the same power as over estates in bankruptcy. The right of debt should be abolished in all cases.

ALEXANDER J.

## VI.—CRIMINAL LAW ABROAD AND AT HOME

THE truth that we do not stand alone, but that we exercise an important influence over our neighbours, one which an insular people, like ourselves, have not always borne home to itself from time to time, and the present movement seems a fitting one for bringing this fact before the public, while the Stockholm International Prison Congress is fresh in our memory, and while the codification of Criminal Law is still engaging the attention of eminent jurists and awaiting the sanction of the Government. The movement for the amendment and codification of Criminal Law, with which the names of the late Lord Macaulay and of Sir James Stephen, who now sits on the Bench, rendered vacant by Sir James's resignation, is a movement which has attracted the attention of thoughtful jurists among our

neighbours. They hail it as an omen of progress, as a token of victory over what is apt to seem to them a Dryasdust spirit of antiquarianism and adherence to a particular legal groove, simply because it was one which contented our fathers. With such a spirit, wherever it may exist, our own history as a Review advocating a sound progress in the amendment of the Law is sufficient to show that we can have no sympathy. We may differ from particular propositions of amendment, but Law Reform, as such, must always command our attention and our sympathy. The very valuable Society of Comparative Legislation in Paris, which has gathered and continues to gather into its fold the flower of the French Bar and Magistracy, has, as might have been expected, devoted no small amount of its time and space to the consideration of our recent advance in the direction of Codification. We have now before us several interesting Papers read by distinguished Members of that Society at various periods, from 1874 to the close of the past year, dealing with the principal stages which have been reached by us on this road. It will probably not be an unprofitable work if we proceed by the help of our neighbours to see ourselves as others see us.

In his impartial and thoughtful review of the Homicide Law Amendment Bill, which passed from the late Recorder of London into the hands of Sir James Stephen, our first critic, M. Ernest Bertrand, Councillor of the Court of Appeal in Paris, draws attention to several salient points of difference between English and French juridical conceptions. When he says that according to French notions, followed by the greater part of the countries of the civilised world, most of which have codified their Law, the first condition of a good Law is that it should be embodied in a clear and precise text which all should be able to consult and understand, we seem to be aware of a touch of irony. The English alone resist, continues M. Bertrand, but even among them many of the best men demand that the Com-

ion Law should be formulated in writing. But M. Bertrand can see that it may well be very difficult for an English lawyer, brought up to what he calls the "formalism" of the Common Law, to free himself at once from all in it which is a useless and undigested mass of encumbrance, and fall back upon the principles and general rules which suffice to constitute a Law. In criticising the language of some of our definitions, M. Bertrand shows how differently they strike foreigners and ourselves. Thus, he points out that a Frenchman reading the definitions of manslaughter and murder, given in 24 & 25 Vic., cap. 100, would naturally take the definition of murder to mean assassination, and that of manslaughter to mean murder. In the French Penal Code murder (*le meurtre*) is homicide voluntarily (*volontairement*) committed, and assassination is murder committed with premeditation or by treachery (*guet-apens*). The intent to kill is not necessary to constitute manslaughter, which arises from the material fact of homicide, and premeditation, continues M. Bertrand, is not the constituent characteristic of murder, which may arise without any premeditation. For instance, he proceeds, two persons meeting by chance begin to quarrel; one of them kills the other in the heat of dispute. This is manslaughter in England, because it was the result of sudden passion. In France, however, it would be murder, if the intent to kill were satisfactorily proven (Penal Code, Art. 295). Again, a man insults another, say by pulling his nose (an example which M. Bertrand has carefully culled from Blackstone). If the person so provoked unfortunately kills the insulter by a beating which has as a fatal effect, but was clearly only intended as a chastisement, it is manslaughter. In France, the person killing his insulter would be actionable for blows voluntarily given without intention to cause death, but which, nevertheless, have had that effect (Art. 309, Penal Code). Yet again, a workman, in a populous town, such as London, throws

down into the streets a piece of timber, or a heavy stone, and kills a person passing by; this is manslaughter, even though the workman must have known that there would be people passing to and fro beneath him. In France this would be only homicide, arising through want of precaution (imprudence), by Art. 319 of the Penal Code. From these and other examples which he adduces, M. Bertrand comes to the conclusion that both manslaughter and murder comprise, under one single technical title, several criminal facts of diverse natures, which in France would constitute different crimes or delicts, provided for by separate articles of the Penal Code.

The French Code has not defined homicide, because, as M. Bertrand says, the word seemed to carry its definition in its face. Homicide arises every time that one man kills another. In the English Bill, he notes, twelve sections were taken up with this point. On the whole, M. Bertrand saw much that appeared to need amendment in the Homicide Bill and its definitions. His criticisms are in some respects substantially identical with those which were at the time made in this country. Section 26, for instance, M. Bertrand observes, required a whole commentary to itself, which should extend over several pages. But he also understood clearly that the answer made to all such objections was: "This is a part of my system; what you would have may be preferable, but my system must stand or fall as a whole; if one part goes, the whole goes." This is a line of reply undeniably difficult to meet. Still we believe that none of the criticisms which were made on the Homicide Bill will have altogether been made in vain, and the Criminal Code Bill cannot fail to have received all the benefit derivable from the careful consideration which its draftsmen desired it should receive at the hands of the legal profession and of the nation before passing into law. In M. Bertrand's words, "it is only after various attempts, to which they shall themselves have lent

a hand, that English jurists and legislators will be able to free themselves from the tyranny of old custom, and understand that a Code ought only to sum up principles and general rules, and that the application of these principles and rules to individual cases must be left to the discretion of the judges."

In a more recent number of the *Bulletin* of the Society of Comparative Legislation, one of the secretaries, M. Georges Louis, Advocate of the Court of Appeal, contributes a very clear and comprehensive survey of our various attempts at Codification, its successful realisation in some of our Colonies and Dependencies, and of the general state of the question among us down to July last. M. Louis points out the influence which the initiative taken by the State of New York in the fusion of Law and Equity has exercised upon Codification. This rupture with the old tradition, says M. Louis, rendered the Codification of Procedure and of the Common Law feasible, if not easy; and in these days, he continues, for Codification to be rendered feasible is to ensure that it will, sooner or later, be carried to a successful issue. The difference between Consolidation and Codification does not escape the observation of M. Louis. When Sir James Stephen published his "General View of the Criminal Law of England," in 1863, and said that the question was, how to detach the pure metal from the dross, and to mould it into the requisite shape, the plans of the majority of English law reformers, says M. Louis, stopped short at Consolidation. The advance which has been made between 1863 and 1878, is, therefore, in his eyes, as in the eyes of all Continental jurists, a very considerable one. That our present scheme of Codification only touches a portion of the field of Criminal Law, is, of course, obvious to our foreign critics, but M. Louis points out that the exclusion from the present Bill of that lesser class of delicts which is known on the Continent by the name of "Contraventions," may easily be justified,

and is, in fact, in accordance with the practice followed in the new Hungarian Penal Code; and it is not uninteresting to remark that a country, which offers several points of contact with ours in its Constitutional and Administrative features, has proceeded with its Criminal Law Codification in a manner very similar to our own. The major part of the new Hungarian Code, we learn from M. Louis, is the work of one leading juridical mind, that of Karl Csemegi. Laid on the table of the House first in 1874, and again in 1876, the Bill was only discussed by the Hungarian Parliament at the close of 1877. The two Chambers voted it within four months, and the Code was promulgated in May, 1878. It is, no doubt, hoped by the promoters of our Criminal Code Bill that our Houses will follow the example of the Hungarian Parliament. M. Louis, however, suggests a doubt whether the low opinion which Sir James Stephen appears to entertain of the usefulness of Parliamentary discussion of the Bill is not rather an extreme one. On the whole, our scheme of Codification gives M. Louis the impression of being essentially English, and he sees in it another proof of the truth of the saying, that the Penal Law of a country is that which best reflects its characteristics and its social condition. We have modified considerably the basis of our law on several points, M. Louis says, but nevertheless our work has, as a whole, been that of codifying the existing law rather than of creating a new law. The language in which the new code is cast appears to a foreign eye immeasurably superior to anything that has gone before it in this country. There is still a certain amount of seeming verbiage, but the danger of over-conciseness is too patent in Penal Law not to have been constantly present to the minds of the framers of the proposed Code. In this, as in other points, our Code may still be pronounced "essentially English."

Yet another feature of our new draft Code has attracted the attention of foreign jurists, and it is one which has a



direct bearing upon the important subject of medical jurisprudence, or, as our American cousins seem to prefer calling it, forensic medicine. The president of the recently instituted Medico-Legal Society of Massachusetts, Dr. Hosmer, in his introductory address,\* made the judicious remark that "the province and power of forensic medicine once understood, the interest in it cannot fail to be widely spread. Of the community which finds a representative and an embodiment in each individual member, it is the safeguard. It appeals to the instinct of self-preservation in one of its forms. It furnishes the means of establishing the fact of crime committed against the person, no matter whether that crime be fatal, non-fatal, or mixed. With the proof of offence it fixes the basis and starting point of any procedure that proposes to detect the offender, the limits of whose accountability forensic medicine must define in accordance with those distinctions which originate in the difference between a sane mind and an unsound or defective one."

What are the distinctions which constitute the difference, in a legal sense, between a "sane mind and an unsound or defective one," must necessarily be a very difficult legal question, yet one with which any Code must grapple. In the January number of the *Bulletin* of the Society of Comparative Legislation, we find an interesting discussion of this point in relation to our Criminal Code Bill, in a Paper by M. Babinet, Councillor of the Court of Cassation.

The subject is one which is at the present moment engaging the attention of the French Government. Existing French Legislation deals, it would seem, very briefly with the matter. Article 64 of the Penal Code is cited by M. Babinet, as limiting itself to the statement that "no crime or delict exists where the accused was of unsound

\* Transactions of the Massachusetts Medico-Legal Society, Vol. I., No. 1. Cambridge (Mass.), 1878 (sent to us by the courtesy of the State Board of Health, Massachusetts).

mind (*en état de démente*) at the time of the act, or when he was under the constraint of a force which he could not resist (*contraint par une force à laquelle il n'a pu résister*). It will be seen, as M. Babinet points out, that French Legislation has not defined legal insanity as affecting responsibility for crime. Each case is therefore decided on its own merits, and according to the evidence of medico-legal experts and forensic debate.

Turning to England, M. Babinet, after summarising the evidence given in the cases of Christina Edmunds and Thomas Humphreys, and the views expressed on the general question by Baron Martin and Baron Bramwell, proceeds to consider what is the method in which our new Code proposes to deal with the subject. This he finds laid down in two sections of the Bill, sections 20 and 21, which he reproduces. Of the theoretical definition of Insanity, given in section 20, M. Babinet observes that it seems to him wanting in clearness and exactitude, and that it rather stands in need of the commentary of Baron Bramwell's language, whose views it is intended to embody. For a man may be ill or weak in mind, he remarks, without being freed from responsibility, unless we go a step further and prove that he did not understand the nature of his act, or that he did not know it was forbidden by Law or Morality, or that the impulse under which he acted was, in consequence of the nature of his illness, an irresistible force.

The situation supposed in section 20, M. Babinet thinks, though possible as a hypothesis, would be difficult to prove in Court and to the satisfaction of a jury. He questions whether conviction or acquittal would not come to depend upon a purely philosophical theory, if section 20 is not amended by the Royal Commission charged with the revision of the Bill.

Of section 21, on Intoxication, M. Babinet approves much more decidedly. Its first paragraph appears to him to require no improvement, but the second he thinks a little

obscure, though capable of being understood as importing an extension of the right to speak, of intoxication, and to give jurists power in cases where there is no premeditation condemned by the Moral Law, but only a delinquency by the Positive Law of an advanced civilisation.

In any case, we agree with M. Babinet that the subject has not yet been spoken on this difficult question by Text-writers or Legislators.

## VII.—SELECT CASES: SCOTLAND

By HUGH BARCLAY, LL.D

### County Franchise—New Qualification

A person stood enrolled as "*tenant and occupier*" of a house, which he left, but stood on the valuation roll as "*prietor and occupier*" of another house. The sheriff entered him in the voters' list as a voter of the second house, and he made no claim upon the roll. A voter objected to his remaining on the roll, on the ground of his qualification. The person objected to move to correct the register of voters by altering the entry from "*tenant and occupant*" to "*proprietor and occupant*." The Sheriff made the correction craved. On appeal, the Court reversed the judgment, and sustained the objection. *Ormidale*: "The proper and regular course would have been to have adopted the new qualification. If he had done so, every person would have had the opportunity of objecting. Now, when the entry in the register, as it stands, has been made, and the qualification now gone, we cannot sustain the objection. It is as if, when a voter, disregarding the proper machinery of the Act, sought to remain on the register in a position of disqualification." 2 Nov., 1877. *Livingston v. C.*

**County Franchise—Teacher of Public School.**

A schoolmaster claimed to be admitted a voter. He was appointed during the pleasure of the School Board. He possessed house and garden of the annual value of £15. The claim was objected, as held on a defeasible title. The Sheriff sustained the objection. The Court affirmed, being of opinion that it was no longer an open question. A similar decision was given where the engagement was terminable on two months' notice. 2 Nov., 1877. *Kilgour v. Halley, Mitchell v. McNicol*, 5 S.C., 5. 9 Nov., 1877. *Boyle v. McGowan*, 5 S.C., 10.

**County Franchise—Detached Portions of Counties.**

*Held* that the qualification in detached portions conferred a right to vote in the county in which they are locally included. 9 Nov., 1877. *Hally v. Brown*, 5 S.C., 7.

**Reparation—Damnum Fatale—Contributory Negligence.**

*Held* that overflow of water by the bursting of a pipe in the defender's house rendered him liable for damage done to a neighbour, and that there was no contributory negligence in the pursuer not giving timeous notice, and removing his goods. Per Lord Justice Clerk (Lord Moncreiff): "The power of the water-pipes to resist ordinary contingencies is at the risk of the person who placed and kept them there, and the consequences to third parties of their not being sufficient must fall upon the proprietor. Contributory negligence to exclude a claim for reparation must be negligence contributing to the *cause* of the injury. But negligence, which only *increases* the injury caused by another, is not in this sense contributory, but only affects the *quantum* of the damages." Shearman on Negligence was referred to. 16 Oct., 1877. *Moffat & Co. v. Park*, 5 S.C., 13.

**Public Records—Delivery of a Deed to be Produced in an English Court.**

A Will was allowed to be taken from the record to be produced in an English Court on security by bond, to be returned within six months, an extract of the deed being previously lodged in its stead. Per Lord President (Inglis): "It appears to me that the question between the parties cannot be tried in the English Court without production of this deed, and that no other evidence will be available, and in particular that an extract would not suffice to prove the petitioner's case. I think, there-

re, that there being a case of necessity, the petitioner, as the executor under the deed, is entitled to have the deed delivered to him." 8 Nov., 1877. *McDonald*, 5 S.C., 44.

#### **Arbitration—Exclusion of Suit.**

A building contract had a clause, "Should any disputes or differences of opinion arise betwixt the contracting parties connected with this contract or the execution of the work, the same shall be and are hereby referred to B (the architect), whose decision shall be final." After the work had been completed, the builder had the work measured and priced according to the schedules, and on refusal of payment he brought an action. The employer disputed the accuracy of the measurements, and held that they were not binding on him, and that the clause of arbitration excluded the action. Lord Young, the Lord Ordinary, sustained the objection, holding "that the dispute is connected with the contract on which the pursuer founds and relies, and that the reference clause comprehends it." The Court reversed, and *Held* that the clause did not exclude the action. Per Lord President (Inglis): "The general rule established by the cases is, that the questions included in the arbitration clause are such as arise in the course of the execution of the contract, and requiring to be immediately disposed of, in order to prevent delay and consequent loss to one or both parties. Now the dispute here is not of that nature at all. The work is finished, and taken off the hands of the contractor. No dispute has been raised as to the entire completion or the quality of the work. Such a question is altogether beyond such a clause of reference as this. It may be that in the course of disposing of this case some questions may arise falling properly within the reference. But no such question appears as yet." 6 Nov., 1877. *Kirkwood v. Morrison*, 5 S.C., 79.

#### **Error—Sale of Heritage.**

*Held* that the purchaser of an heritable subject for £345 at a roup was not entitled to repudiate the sale because a very small part of the subject was found to belong to himself. Per Lord Justice Clerk (Lord Moncreiff): "I am not going to enter into the question how far a fact within the means of knowledge of a purchaser before the contract of sale, but not ascertained until after, will entitle him to redress if substantial error be made out. I think that the regulations in the articles of roup of the kind we have here will receive fair effect, but that

a clear case of injustice and iniquity will not be covered by them. I know no case where reduction or rectification of the contract has been allowed unless the error was material. The price to the pursuers was not even enhanced by £5, because they made their offer without knowing or caring what the extent of ground was, and they cannot say they have not got a good title." Many English authorities were cited. 8 Nov., 1877. *Morton and Others v. Smith and Others*, 5 S.C., 83.

#### **Railway—Reparation—Culpa.**

A horse strayed at night, without fault of the owner, two miles on a public road, then upon a private branch railway, on a level crossing, and afterwards when on the main line it was killed by a passing train. *Held* that the owner of the branch line was not liable in damages, either under the statutes or at common law, because of not having gates at the level crossing, or at the junction with the main line. Per Lord President (Inglis): "The occupant of the adjoining land is also the owner of the private railway, and accordingly he is the only person who is creditor in the railway company's obligation to fence, and if both the creditor and the debtor in that obligation agree to make a breach in that fence for the purpose of letting in the private line to join the main line, there seems to be nobody else that can interfere with it, or can say they are prejudiced by what they have done." 9 Nov., 1877. *Matson v. Baird & Co.*, 5 S.C., 87.

#### **Bankrupt—Discharge—Fraud.**

The Court refused a bankrupt his discharge, though ten years had elapsed since the date of the sequestration, and though there was no opposition, in respect that the accountant in bankruptcy was "unable to certify that the bankruptcy arose from innocent misfortune or losses in business. Per Lord President (Inglis): "The statute leaves it to the discretion of the Court to grant or refuse a discharge, though unopposed, whenever the report of the accountant in bankruptcy or other sufficient evidence discloses a certain state of matters, viz., that the bankrupt has been guilty of fraudulent concealment of his estate, &c." 16 Nov., 1877. *Miller*, 5 S.C., 144.

#### **Ship—Shipmaster—Bottomry—Cargo.**

A ship came into collision with another, and put into a home harbour for repairs. The captain and mate, who were owners

he ship, granted to a shipbuilder a bond of bottomry for the amount of repairs and damages due to the other vessel. The owner of the cargo refused to consent to the cargo being hypothecated for the damage. The ship and cargo were sold. Held that except to the extent of the freight, the bondholder had no right to the price of the cargo, as the master under the circumstances had no right to hypothecate it. Per Lord President (Inglis): "The master of a vessel in a foreign port, when he has not the means of communicating immediately with her owners, and with the other parties interested, such as the owners of the cargo and the underwriters, represents the interests of these; and it is his right and his duty to do the best for all concerned. And if the circumstances be such that he cannot proceed on his voyage without raising money on bottomry, and it is necessary to include the cargo in the bond, he is justified in doing so. But here the owners were present, so without the consent of the owners of the cargo, he could not hypothecate their property." Many English cases were cited. 23 Nov., 1877. *Veitch v. Scott and Others*, 5 S.C., 196.

### Restrictions and Prohibition.

A feu charter contained a prohibition against any building on lands feued, except dwelling houses, and prohibiting any public house or tavern. Held that the erection of a hydropathic establishment, though not licensed to deal in excisable liquors, was a contravention of the prohibition, and where the superior had given a relaxation of the restriction in one case this did not prevent his insisting on the restriction on the remainder of the land. Per Lord President: "The main occupation of the building is for the purpose of carrying on a trade, and a trade in the strictest sense of the term. It is quite a different thing from a man taking in lodgers into his private house. A hotel does not cease to be a hotel because it has no license. A temperance hotel is none the less a hotel because it has no license. On the second point, it will not do to say that because an illegal feu has been granted and the conditions of the feu allowed to be violated that therefore all the other feuers are liberated." Lord Shand dissented on both grounds: "I apprehend there is no ground which can prevent the proprietor or occupant of a dwelling-house from having lodgers or boarders or from using it as a boarding-school. The superiors cannot enforce the restriction against one property while they have released it on

the property adjoining and thus materially altered the character of the immediate neighbourhood." English cases were cited. 23 Nov., 1877. *Ewing v. Campbell*, 5 S.C., 230.

**Reparation—Liability of Owner and Custodier of a Dog.**

A dog, whilst in the custody of two persons not the owners, attacked and bit a man. Both were aware that the dog had previously bit a man, to whom the owner had given reparation. The custodiers were found liable in damages, but the owner assailed. Per Lord Justice Clerk (Lord Moncreiff): "The custodiers of the dog had full knowledge of the previous attack, and it lay with them to allege and prove provocation. I am not prepared to lay down as a general proposition that the owner of a dog is not to be held liable unless the dog is in his personal custody. On the contrary, I think that as long as the owner retains the substantial control of its custody, it is of no consequence whether he exercises that control by himself or by another. He is responsible for its safe custody to the public. Indeed, it has been held that the knowledge of a servant of a dog's ferocity is the knowledge of the master. I am therefore not prepared to say that if a man keeps a dog which he knows ought not to go at large, and lends it to another person who allows it to go at large, he may not be held responsible. But this is not to be stretched to an unreasonable extent. If one commits the care of such an animal to another for a length of time, and for his own behoof, and the custodier is trustworthy, I think the owner is not liable. In this case, the dog had been six weeks with the custodiers, who were as fully aware as the owner of the former outbreak on the dog's part. I think the owner was entitled to assume that they would take proper care, and not let the dog go at large." English cases were cited. 23 Nov., 1877. *Gowan v. Dalziel*, 5 S.C., 241.

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## Legal Obituary of the Q

(ENGLAND, SCOTLAND, AND IRELAND)

DAM, James, Esq., S.S.C. (Scot.), aged 88.

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KINS, George, Esq., Barrister-at-Law (Ireland), died 1868. *Nov.* 24.

RKER, Theodore, Esq., Solicitor, aged 34. *Nov.* 20.

ST, William, Esq., Solicitor, Leeds, aged 70. *Nov.* 17.

BB, William Henry, Esq., M.A., Solicitor, aged 52. Admitted 1861. *Jan.* 17.

LETON, John William, Esq., Q.C. (Irel.), J.P. for Co. Dublin. *Nov.* 11.

RR, John, Junr., of Gray's Inn, Esq., 1st Magistrate of the Gambia Settlement, died 1873. *Dec.* 3.

MURTNEY, Henry Nicholas, of Lincoln's Inn, Esq., (while travelling in Jamaica). LL.M., died 1873. *Dec.* 20.

INNINGHAM, James, Esq., W.S. (Scot.), aged 70. J.P. for City of Edinburgh. *Nov.* 10.

ALTON, Thomas, Esq., Solicitor, Cardiff, Glamorganshire, aged 80. Admitted 1819. *Dec.* 10.

MMETT, William, Esq., Solicitor, Chard, Somerset, aged 70. Admitted 1841. *Nov.* 30.

OWNING, McCarthy, Esq., M.P., (formerly admitted 1839), aged 64. M.P. for Cork (Liberal). J.P. for Co. Kerry, and J.P. and D.P. for Co. Limerick.

UNBAR, John, of the Middle Temple, Esq., 1st Bt. (Home Ruler) for New Ross, aged 51. *Nov.* 10. Called to the Irish Bar 1849, to the English Bar 1854.

RDIN, Robert Garde, Esq., M.A., Solicitor, died 1841. *Oct.* 19.

ST, Sir James Buller, Bart., D.C.L., of Gloucestershire, and a Bencher of the Inner Temple, eldest son of the late Right Hon. Sir Edw.

Bart., for some years Chief Justice at Calcutta, and author of "East's Reports," and, jointly with the late Mr. Durnford, of the "Term Reports." M.A., D.C.L., Ch. Ch. Oxon. Called 1813. M.P. for Winchester (Liberal-Conservative), 1830-32, and 1835-64. Became a Bencher 1853. J.P. for Oxfordshire, and J.P. and D.L. for Gloucestershire. *Nov.* 19.

ERRINGTON, John, of High Warden, Northumberland, and of Lincoln's Inn, Esq., Barrister-at-Law, aged 70. J.P. and D.L. for Northumberland, High Sheriff, 1865. Called 1832. *Dec.* 11.

FALCONAR, Alexander, Esq., Sheriff-Substitute of Nairn, Scotland, since 1823; aged 75. *Dec.* 13.

FOSTER, Edward Walker Webb, Esq., Solicitor, Feckenham, Worcestershire, aged 30. Admitted 1873. *Oct.* 18.

GILLMAN, Sylvester, Esq., Crown Solicitor, for Cork County and City, Ireland, aged 55. Admitted 1848. *Nov.* 30.

GORDON, John, Esq., Solicitor, Clerk of the Peace for the Borough of Bolton-le-Moors, aged 71. Admitted 1829. *Nov.* 27.

GRANT, Robert, Esq., of Kinarth, Advocate (Scot.), aged 77, J.P. and D.L. for County of Elgin. Called 1823. *Oct.* 15.

GROVER, John Nightingale Key, Esq., Solicitor, Manchester, aged 38. Admitted 1861. *Nov.* 11.

GWILLIM, John, Esq., Solicitor, Hereford, aged 64. Admitted 1837. *Oct.* 16.

HAYTER, Right Hon. Sir William Goodenough, Bart., Q.C., and a Bencher of Lincoln's Inn, aged 85. The deceased baronet, who for many years acted as the Liberal "Whip" in the House of Commons, was the youngest son of the late John Hayter, Esq., of Winterbourne-Stoke, Wilts. Educated at Winchester, and Trinity Coll. Oxon (second class in Classics 1813). Called to the Bar 1819, and practised for twenty years, retiring in 1839 as a Q.C.; M.P. for Wells, 1837-65; Judge Advocate-General, 1847 till May, 1849, when he was appointed Financial Secretary to the Treasury; Parliamentary and Patronage Secretary, 1850—Feb., 1852, and again Dec., 1852—March, 1858. Succeeded in the baronetcy by his son, now Sir Arthur Divett Hayter, M.P. for Bath.

HYDE, Thomas, Esq., Solicitor (Irel.), aged 76. Admitted 1858. *Nov.* 9.

IVIMEY, Joseph, Esq., Solicitor, Superintendent Registrar of St. Pancras, and for many years Solicitor to the Anti-Corn Law League, aged 76. Admitted 1825. *Oct.* 4.

JONES, John, Esq., Solicitor, Dolgelley, aged 70. Admitted 1832. *Nov.* 10.

KEENE, Charles Hansard, of Lincoln's Inn, Esq., Barrister-at-Law, one of the Registrars of the Court of Bankruptcy, London, aged 54. Called 1848. *Nov.* 15.

KEIGHLEY, George Walter, Esq., Solicitor. Admitted 1868. *Dec.* 12.

KELLY, Thomas, Esq., Barrister-at-Law (Irel.) Called 1872. *Oct.* 28.

LANE, Charles, of the Inner Temple, Esq., Barrister-at-Law, aged 85. M.A. Queen's Coll., Oxon. J.P. and D.L. for Oxfordshire. Called 1818. *Dec.* 9.

LAW, John Drinkwater, of the Middle Temple, Esq., Student-at-Law, LL.B., Trin. Coll., Camb., aged 26. *Nov.* 5.

LYON, Thomas, Esq., Solicitor (of Messrs. Newman and Lyon of Clement's Inn, and of Yeovil, Somerset), aged 64. Admitted 1837. *Dec.* 1.

MACKNIGHT, James, Esq., W. S. (Scot.), aged 68. Admitted 1833. *Nov.*

MALIM, Frederick John, Esq., Solicitor, Chichester, Coroner for West Sussex, aged 37. Admitted 1862. *Dec.* 16.

MILLIKEN, David, Esq., Solicitor (Irel.) Admitted 1874. *Nov.* 29.

MONAHAN, Right Hon. James Henry, late Chief Justice of the Court of Common Pleas, Ireland, aged 73. Son of the late Michael Monahan, Esq., of Heathlawn, County Galway. B.A. Trin. Coll. Dublin, 1823; called to the Irish Bar, 1828; Q.C., 1840; Solicitor-General for Ireland, 1846-47; Attorney-General, 1847; M.P. for Galway, 1847; Member of Privy Council in Ireland, 1848; Chief Justice of the Common Pleas, 1850, till his retirement in 1876. *Dec.* 9.

MOODY, John James Paul, Esq., Solicitor, Town Clerk of Scarborough, aged 64. Admitted 1835. *Nov.* 18.

MORGAN, Thomas Owen, of Goginan, near Aberystwith, and of Lincoln's Inn, Esq., Barrister-at-Law, J.P., D.L., aged 79. Called 1823. *Dec.* 5.

PARRY, Francis Charles, of Allington, Berks, and of the Middle Temple, Esq., Barrister-at-Law, in his 99th year. M.A. Univ. Coll., Oxon., 1806, in which year also he was called to the Bar. *Dec.* 18.

RITCHIE, Arthur Macdonald, of the Middle Temple, Esq., Barrister-at-Law, aged 58. Called 1845. *May* 16.

ROBERTS, George Christopher, Esq., Solicitor, Hull, aged 54. Admitted 1854. *Oct.* 21.

ROGERS, George, Esq., Solicitor, Calcutta, formerly of London, aged 51. *Sept.* 17.

RUSSELL, George Lake, of Lincoln's Inn, Esq., Barrister-at-Law, Judge of the Bloomsbury County Court, aged 76. Educated at Eton, and Christ's Coll., Camb. Called 1826. Appointed a County Court Judge 1865. *Dec. 16.*

SCOTT, Alwyne Gilbert, of the Inner Temple, Esq., Barrister-at-law, aged 28. B.A., Ch. Ch. Oxon. Called 1876. *Nov. 23.*

SHAPLAND, John Terrell, Esq., Solicitor, South Molton, Devon, aged 65. Admitted 1837. *Dec. 23*

SHERWOOD, Richard, Esq., Solicitor, aged 30. *Oct. 29.*

SIDEBOTTOM, Charles John, of the Middle Temple, Esq., Barrister-at-Law, aged 88. Called 1818. J.P. for Herefordshire and Worcestershire, and formerly Police Magistrate and Judge of the Worcester County Court. *Oct. 26.*

SINCLAIR, George Lewis, Esq., W.S. (Scot.) Admitted 1827. *Oct. 22.*

SLADE, Henry Hercules, Esq., late Stipendiary Magistrate for County Leitrim, Ireland, aged 79. *Oct. 16.*

SMITHSON, Samuel Raynor, Esq., B.A., Barrister-at-Law (Irel.), aged 32. Called 1869. *Nov. 2.*

THOMAS, Edwyn, Esq., Barrister-at-Law (Irel.) *Oct. 29.*

TINDAL, William, of the Inner Temple, Esq., Barrister-at-Law. Called 1828. *Nov. 3.*

VELEY, Augustus Charles, Esq., Solicitor, Braintree, aged 73. Admitted 1836. *Jan. 19.*

WEBB, George, Esq., Solicitor, aged 52. Admitted 1873. *Dec. 30.*

WOOD, Hubert, Esq., Solicitor, aged 42. Admitted 1857. *Nov. 11.*

YARDLEY, Sir William, of Hadlow Park, Kent, and of the Middle Temple, Knt., formerly Chief Justice of Bombay, aged 67. J.P. for Bucks and Kent, and J.P. and D.L. for Pembroke-shire. Called to the Bar 1837. Appointed Puisne Judge at Bombay 1847, and Chief Justice in 1852, resigning in 1858. *Dec. 15.*

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## Reviews of New Books.

*Ontwerpen van een Wetboek van Strafrecht.* 'Sgravenhage. Belinfante. 1875.

*Le Nouveau Projet d'un Code Pénal pour les Pays Bas, et la Question Pénitentiaire.* Par M. S. POLS. Utrecht. 1876.

*Statistica delle Carceri del Regno d'Italia.* Palermo. 1877.

*Rivista di Discipline Carcerarie,* diretta da M. BELTRANI SCALIA. Roma. 1878.

*Des Ecoles Normales pour les agents chargés de la surveillance des Prisons.* Par M. BELTRANI-SCALIA. Paris. Imp: Chaix. 1878.

*Der Begriff der Strafe,* von HEINRICH PFENNINGER. Zurich: Orell Füssli. 1877. (London: Nutt).

*Cours Elementaire de Droit Pénal.* Par JOSEPH LEFORT, Avocat à la Cour d'Appel, Lauréat de l'Institut. Paris: E. Thorin. 1877.

*Statuts de la Société Générale des Prisons.* Paris. 1877.

*Revista de los Tribunales,* Periodico de Legislacion, Doctrina, y Jurisprudencia, dirigido por D. VICENTE ROMERO Y GIRON. Madrid: Gongora y C<sup>ia</sup>. 1878.

The recent assembling of the Second International Prison Congress, which was opened in the Riddersaal of the Swedish Houses of Parliament on the 20th August, 1878, furnishes an additional incentive to our asking the attention of our readers to a considerable mass of foreign legal literature of great interest for Criminal Lawyers and Prison Reformers. With the objects which the Stockholm Congress had in view, most of the Governments of the Continent, and even some in the far East and in South America, testified the most marked sympathy. The Italian Government had lent a very practical aid by facilitating the printing in the excellent "*Rivista di Discipline Carcerarie*" of the papers by Italian, French, Dutch, and other Penalists of eminence who were appointed, or who volunteered to write on the Questions to be submitted to the Congress. That this should have been so will surprise none who recall to mind the long roll of illustrious writers which have rendered

Italy a classic land for Penal Jurisprudence. Beccaria, Romagnosi, and in our own day Pellegrino Rossi, Exile, Professor, Minister of Pius IX., are among the names which rise at once to the memory, and the list of works which we cite will suffice to show that the present generation of Italians is striving "*in memoriam majorum*" to carry into practice the scientific doctrines which it has inherited from such a distinguished past.

We hail with great pleasure the collaboration in the same good cause of our able Spanish contemporary, the "*Revista de los Tribunales*." It is a fair omen for the future of Spain that a Legal Review, which, like ourselves, devotes its attention at once to Practical Law and Scientific Jurisprudence, should maintain so high a tone of literary and judicial excellence. We sincerely trust that whatever political party may have the administration of affairs, the Spanish Bar will keep up in its integrity a Review so calm and impartial in its language, so devoid of partisanship, so devoted to the true principles of the "*Scientia rerum Divinarum atque Humanarum*." The "*Revista de los Tribunales*" has paid due attention to the importance of the Stockholm Congress, and presented its readers with the full programme, and a short daily summary of the proceedings, besides translating the opening address by Dr. Wines, the indefatigable President of the Congress.

From the University of Zurich comes Herr Pfenninger, who would lead us back to the principles of that great Dutch jurist whose name is such a tower of strength on the side of Justice and Right. In M. Lefort we have an able pupil of the late distinguished French Criminalist, M. Ortolan. Of Signor Beltrani Scalia it is sufficient to say that he is Inspector-General of Prisons for the Kingdom of Italy, to show what a good title he has to be heard on all subjects connected with Prison Reform. France has, of late years, given proof of a revived interest in this important subject, which promises to bring forth good fruit, both in the ingathering of statistics and the official and unofficial study of the many difficult questions that lie on the very threshold of all enquiry into it. The present French Government, under the inspiration of M. Dufaure, has taken a good step in the establishment of a "*Conseil Supérieur des Prisons*," thus securing the constant watchfulness of a responsible body of officials, as well as the advantage of their frequent discussion of all questions connected with Prison discipline and the management of

Penal Establishments and Reformatories. But this, though a very excellent step for the Government to take, admitted of being supplemented by an unofficial body, which should embrace men of all shades of political opinion, whose bond of union should be their common interest in this great subject. Such a Free Prison Reform Society, excellent in its conception as the Free School of Political Science, and like it, intended to work side by side with the Government institutions, has happily been founded in Paris under the title of the "*Société Générale des Prisons*." We are glad to know that both the official and unofficial societies were represented at Stockholm. Of the entirely colourless political character of the latter it is enough to say that the names of the Duc de Broglie and M. Jules Simon are both to be seen in amicable juxtaposition on the list of original members. We only bring out these facts in order the more conspicuously to set forth the hold which these questions have taken on the minds of statesmen, as well as jurists and philanthropists, in France, and to obviate any possibility of misconception as to the true state of the case. And few things could more conclusively show the zeal with which France has bent herself to the performance of the many home tasks which awaited her at the close of some of the saddest pages of her recent history. That such should have been among her occupations is one of the best omens for the future well-being of France. The Government of Sweden and Norway, which took the lead in the convocation of the late Congress, has long been deeply interested in the subject of Prison Reform. It is for the present King an inheritance from his father; for the existing Government, a legacy bequeathed by its predecessors. Under such circumstances it was fitting that the second meeting of the International Committee, and of the Congress convoked by it, should take place in the capital of Sweden—in the Venice of the North. To this claim even Paris, in the fullness of her glory as the rallying point of all nations through her Universal Exhibition, could make, and did make, no demur; for—as a French senator, M. Bérenger, gracefully said in a recent meeting of the committee at the Ministry of the Interior, in Paris—she bows before the rights which Sweden has acquired by her study of these questions, and before monarchs who have won themselves the name of initiators of sound progress.

For the right understanding of the elaborate preparations made with a view to the practical working of the Stockholm

Congress, the *Rivista di Discipline Carcerarie* for some time past proved itself an almost indispensable help. It may, indeed, in regard to that portion which is printed in French, and entitled, "Bulletin International pour l'étude de la Réforme Pénitentiaire," be called the official organ of the International Committee. In that part of the *Rivista* will be found the official communications of the Committee, Reports of their Meetings at Brussels and Bruchsal, and lately in Paris, and the entire series of official reports on the questions submitted for the consideration of the Stockholm Congress. Besides this, in the Italian portion—the *Rivista* proper—will be found a complete collection of the essays written on the various questions by Italian Penalists, selected from a wide range of professors, councillors, or advocates of the Court of Cassation or Appeal, and prison officials. In addition to these features of special utility at the present moment, Signor Beltrani-Scalia provides his readers with a constant supply of information on matters of interest in regard to Penal Law and Prison Reform, such as the debates on the Prisons Bill in our own Parliament, the discussions in the Austro-Hungarian Chambers on the Draft Penal Code for the Kingdom of Hungary, and in the French and Italian Chambers on the latest Prison Legislation in France, and on the oft-mooted Draft Penal Code of the Kingdom of Italy. This, of course, is over and above the printing of official documents, laws, decrees, and ordinances of the kingdom on matters connected with Criminal Law and Prison Discipline, and the publication, from time to time, of original articles bearing upon the Theory or Practice of the general subject-matter of the Review. We draw attention to the varied contents of the "*Rivista di Discipline Carcerarie*" all the more gladly that we have long wished to express our opinion of its value, and the present moment seems to furnish a most opportune occasion. Herr Pfenninger, whose position as a Privat-Docent in the University of Zurich, naturally inclines him to a mixture of the Philosophical and Practical in his views of Law is, as we have said, a strong partisan of Grotius and his school. With Grotius, as he justly remarks, Humanity was no mere phrase or scientific hypothesis, but the living soul of his doctrine. And he regarded punishment as the sanction of wrong-doing, "*malum passionis quod infligitur ob malum actionis.*" It has been said that in regard to Penal Law the present age constitutes the Philosophical period, the two previous stages through which this branch of Law has passed having been respectively the Barbarian and the Theological.



The right of vengeance is first of all taken from the individual and assumed by the State, and is exercised with a frequently excessive and needless severity. In the Theological period new crimes make their appearance on the Statute Book, under clerical influence, and these are also often very severely punished. In the Philosophical period the dominant idea is the protection of Society. In this sense both Herr Pfenninger and M. Lefort may be called Philosophical Jurists, but they are none the less also practical. Herr Pfenninger would idealise the State, and bring it into prominence as against the individual. M. Lefort lays down, with Beccaria, the distinction between the "forum internum" of the conscience and morality, and what we may, to keep up the simile, call the "forum externum" of public law, and shows that it is not for every act contrary to morality in the abstract that man falls under the sanctions of repressive legislation. For Herr Pfenninger, the idea of law, the "Rechtsidee," is in opposition to the Law of Might, therein, as in other points, differing from what we can collect as the view of Ihering's school. And Pfenninger explicitly declares that he sees an immense progress in that which is to Ihering an extinction of the "Rechtsgefühl," or conception of Law, viz.: the exclusion of Penal Law from the purview of the Civil Law. To a considerable extent, therefore, Pfenninger may, we think, be said to stand on the ground of the older jurists, to whom he turns with a satisfaction none the less real from his acquaintance with the views of the most "advanced" modern writers and thinkers on the Philosophy of Law. M. Lefort, having a more distinctively practical object before him, in the composition of an Elementary Course of Criminal Law, intended as a commentary for the use of students, and necessarily taking the French Penal Code as his basis, deals less fully with theory, and more fully with practice, than is the case with Herr Pfenninger. And it will readily be understood by those who remember M. Lefort's previous works, on the "Contrat de Location Perpétuelle," and "Intempérance et Misère," which have been noticed in this Review, that in his "Cours de Droit Criminel" great attention is paid to the historical and economical aspects of the branch of law with which the present work deals. From the point of view, indeed, chosen by M. Lefort, it was obviously necessary that he should deal not simply with Criminal Law in the abstract, with the idea of punishment, of absolute justice, and so forth, but also with Penal Law in its widest

sense, and in its international as well as its national aspects. And accordingly we find Exterritoriality among the earliest of the questions of International Law which are discussed in his book. We observe that on this point M. Lefort's views are in accordance with the general tenor of our law, and with the doctrine which has been laid down in these pages by Sir Travers Twiss rather than with those of the many foreign jurists who would extend extraterritoriality to the merchant ship. With regard to the present state of French Criminal Law, M. Lefort is far from being blind to the defects in it, and he advocates reforms which cannot fail to meet with the approval of his English readers. "The simplification of formalities, the curtailment of a too lengthy procedure, the assurance of better protection to the accused, greater respect for individual liberty, the mitigation of some punishments, the abolition or modification of punishments out of harmony with our present civilisation," such are among the most salient features of M. Lefort's earnest pleading for that "amelioration and moral education of its members which it is the interest of society to make the basis of all legislation for the repression of crime." It would be impossible not to sympathise with M. Lefort in the objects which he thus sets forth as the aim of the Penal Law of the future.

The Draft Penal Code for the Kingdom of the Netherlands and the thoughtful discussion of its principal provisions by the eminent Dutch Penalist, M. Pols, of Utrecht, deserve fuller consideration than we are at present able to give them. It is probable that to an English eye the Dutch project would bear a somewhat too idealistic aspect, little as we are apt to connect the Netherlands with idealism. The committee which was charged with the task of drafting the new Penal Code appears to have desired to lay down fresh lines, instead of remaining within the groove of the French Code of 1810, which forms the basis of the existing Dutch Penal Law, and it will accordingly be found that the result of their labours is a novelty rather than a reform. The Committee comprised some of the best Dutch Penalists, including M. Pols himself, M. Modderman, and M. de Pinto, who was appointed Secretary, and to whose kindness we are indebted for the Code and the Pamphlet of M. Pols. When we mention that the Committee was appointed in 1870, and that the Code elaborated by them was duly published in 1875, and that it has not yet (so far as we are aware) passed into law, having been under consideration, for a lengthened period, by the Section for Justice of the Council of State before

being submitted to the Chambers, the course adopted in our own country, with regard to the recent Indictable Offences Bill, will not seem to partake of the character of an unnecessary delay. The Italian Draft Penal Code has likewise been subjected to lengthy Parliamentary and extra-Parliamentary discussion, and, in fact, owing to ministerial changes, has been to a great extent re-cast. If this be the case in countries already possessing Codes, it is not to be expected that a less careful consideration of the details of our proposed Codification of the Criminal Law should be adequate to our needs. The appointment of such a commission as that which includes Lord Blackburn, Mr. Justice Lush, and Sir James (now Mr. Justice) Stephen, is itself an earnest of the care and the excellence with which the work of Codification will be carried out. Whether it will fall within the scope of our Commissioners to take into consideration the reforms in Penal Law, which have been so numerous on the Continent of late years, we cannot, of course, forecast; but if it should be so, we might fairly suggest the Dutch Draft Code, as one of the most strikingly original works of the day in Penal Law. The Italian Government, which is well known for the interest it has shown in Criminal Law and Prison Reform, has published a splendid volume of Prison Statistics down to 1875, which we have received from the Inspector-General of Prisons, Commendatore Beltrani Scalia. The work is a remarkable one in many respects, and not less so as a specimen of convict labour in the "Bagno," or Convict Prison of Palermo. It contains, besides a mass of valuable statistics, interesting accounts, illustrated by plans and engravings, of the Italian Penal Colony on the islands of Pianosa and Montecristo. The Director-General of the Administration of the Prisons, Sigr. Pavolini, who apologises in his letter to the Minister of the Interior for any crudeness in the printing on account of the circumstances of its production, may we think fairly congratulate himself on the success of his first attempt in utilising convict labour for this branch of State service. A very important point connected with Prison Reform, but unquestionably one surrounded with great difficulties, is the choice and training of warders and guards. It has been attempted to solve this problem in Italy by the establishment of a central training school in Rome, of which Signor Beltrani Scalia gives an interesting account in the Pamphlet which we cite, and which has been translated into French, so as to render it more widely accessible to readers. While not disguising the very great

difficulties attendant upon the experiment, the author is yet of opinion, on the whole, that some such organization as that which is under his inspection in Rome will be found to work the desired and necessary reforms in this branch of the public service.

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*Henrici de Bracton de Legibus et Consuetudinibus Angliæ Libri Quinque.* Edited by SIR TRAVERS TWISS, Q.C., D.C.L. (Published under the direction of the Master of the Rolls.) Longmans. 1878.

We have grown so accustomed to the invaluable series of works brought out by authority of the Lords Commissioners of the Treasury, and under the direction of the Master of the Rolls, that it is hard for us to realise the condition of the student of our Laws, Constitution, and History, when as yet these helps to knowledge were not. In the field of Mediæval Jurisprudence we were still far behind our Continental neighbours when the great task of preparing a new edition of Bracton's Classical Treatise was entrusted to Sir Travers Twiss. That a work of such magnitude and importance, demanded in our own pages more than six years ago, should have been placed in the hands of one who has contributed so much to contemporary Juridical Literature in this Review, is a fact of which we gladly take note. The choice of such an editor is an additional proof of the care with which the general supervision of the Rolls series of publications is carried out by the responsible authorities. For sympathetic appreciation of the position of his author as one of our greatest fountains of Law in the Middle Ages, and for depth of erudition and extensiveness of reading in Mediæval Law, it would not have been possible to have chosen a better editor. That Bracton was, in the strictly scientific sense of the term, "Doctor Juris Utriusque," is patent to any student of his text. What position the Civil and Canon Law held in his teaching is a question on which we think, so far as the matter before us at present enables us to judge, the opinion formed by Sir Travers Twiss will ultimately be generally adopted. Bracton's Scientific Jurisprudence is undoubtedly Roman. We do not see that it could well have been otherwise at any time, least of all in his day, when an English Prince had been elected, at least by a party, Emperor of the Romans, and when the tradition of "*Roma caput mundi*" was kept before the world alike by the Holy Roman Emperor and the Holy Roman

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iff. The question, how far Roman Law had in Bracton's become a part of English Law, is one of considerable scientific interest, and will we hope receive further elucidation in future volumes of the present Text. It is practically on soil which Sir Travers has here broken, and it is to be hoped that he may be aided in his necessary investigations by the progress of discovery of ancient sources of knowledge under the Historical MSS. Commission.

Bracton was, as Sir Travers thinks, an Ecclesiastic, we do feel convinced. Rather, to our mind, does the language used in support of this opinion tend in a contrary direction.

It is of course quite possible that he may have been tonsured. We can much better understand one who was, in the *ecclesiastical* sense of the word, a layman emphasising the sacerdotal position of lawyers, so as to stand on equal ground with Church-

men than we could understand such words in the mouth of a layman. And the employment of the term "laici" for persons not versed in the practice of the Law might be a confirmation from existing usage. Quotations from the Old Testament, and reverential expressions to the Virgin Mary, we should incline to regard as part of the natural language of the Thirteenth Century. We find when Peter de Vinea quoted Ezekiel and spoke of that Emperor the two keys of whose hands he said he to have held, and when Frederick, "thou shalt see me speak of his some-time favourite whom I thought a rock," and who in fact was called the "Rock and Doorkeeper of the Empire," it seems quite unnecessary to take Scriptural language as connoting either Sacred or Mediæval. Moreover, there is the very highest Mediæval authority in favour of a priestly character for what we should now call judicial or judicially lay offices. The Emperors themselves, in the West, constantly asserted their own priestly character, though they were neither priests nor deacons. It may be sufficient to recall Charlemagne styling himself "Bishop in things external," the German Emperor "Imperator et Sacerdos;" Frederick II., in the Papacy, losing no opportunity of exalting the character of his Imperial position, and his true Vicar styling himself "the miracles wrought by the body of St. Stephen in Hungary, and claiming for himself the revival of the Spirit of Elias." At the same time it was

Frederick, whom his enemies called the "Godless," and his partizans the "holy," that he was "Legis Antistes," the Bishop of the Law, and the Defender of Justice. We cannot here pursue this subject further; we can only indicate it as one of the many interesting questions in Mediæval Law and History, which a careful perusal of Sir Travers's edition of Bracton cannot fail to suggest to the student. That Bracton's classical work should have remained so long in the condition described in our pages by Mr. H. S. Millman, "closely printed, repulsive: index, marginal abstract, every kind of grammatical and historical light wanting," is certainly far from creditable to us when we reflect upon the excellent work which Continental scholars have done to render Mediæval Jurisprudence accessible to the student. That the edition which we now welcome will be the one edition for the jurist and the scholar there can be no question. We should ourselves have inclined to go further in the way of setting out contractions at full length than Sir Travers Twiss has gone in his first volume. If he is not compelled to a certain determinate amount of reproduction of contractions by the terms under which the Rolls publications are issued, we would certainly suggest the absence in future volumes of the marks for "m," "er," "que," "us," and others which, although plain enough to those who have been accustomed to read mediæval writing, must needs create a certain amount of difficulty to those many readers, unacquainted with MSS., who will now, we hope, be induced to commence the study of Bracton.

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*The Institutes of Justinian*, with English Introduction, Translation, and Notes. By THOMAS COLLETT SANDARS, M.A., Barrister-at-Law, late Fellow of Oriel College, Oxford. Sixth Edition. Longmans and Co. 1878.

This new edition of Mr. Sandars's well-known text of the Institutes ought to supersede all previous issues, for the title-page scarcely does justice to the extent of the changes by which the possessor of the Sixth Edition benefits over the owner of any of the earlier ones. The text itself has undergone changes, being now taken from Huschke, Leipzig, 1868, instead of from the edition of the Brothers Kriegel. Whether the latter is not still the best known and most generally used text is a different question, with which we have not space here to deal. Not only is the Latin text thus to some extent altered, but the English

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lation has been compared throughout with that provided by Professor Hunter's elaborate work, which we noticed some time ago. And, in addition, Mr. Sandars has now, for the first time, offered to his readers what many of them have doubtless coveted, more or less successfully, to make for themselves, a summary of the contents of the Institutes. We do not suppose that Mr. Sandars in doing this desires for a moment to encourage the wholesome practice of each student making his analysis for himself; but to have a norm, or general rule, set before one as a guide and standard is unquestionably useful, and the circumstance that such a norm is provided in the present edition of Mr. Sandars's work cannot fail to give it a preference over its predecessors. We should have been better pleased, indeed, if this new feature had been written with more evidence of general scholarship, such as Mr. Sandars could well command, at least in the shape of reference to modern writers on Roman Law at home and abroad, in whose pages the notions briefly noticed in the Summary would be found more fully treated. But taking, as we must, the goods the Gods send, we can with pleasure recommend to all students for their Bar Examinations a diligent perusal of the Sixth Edition of Mr. Sandars's version of the Institutes of Justinian.

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*Law of Negligence.* Second Edition. By ROBERT CAMPBELL, M.A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar, and late Fellow of Trinity Hall, Cambridge. Messrs. W. and A. B. Messers & Haynes. 1878.

No less an authority than the late Mr. Justice Willes, in his judgment in *Oppenheim v. White Lion Co.*, characterised Mr. Campbell's "Law of Negligence" as "a very good book," and since good books are by no means plentiful when compared with numbers of indifferent ones which annually issue from the press, we think the Profession will be thankful to the author for a new edition, revised and brought down to date. It is indeed an able and scholarly treatise on a somewhat difficult branch of law, in the treatment of which the author's knowledge of Roman and Scottish jurisprudence has stood him in good stead. We can confidently recommend it alike to the student and the practitioner. The references to cases are full, and yet judiciously selected, and comprise not only English and Scotch, but also American, decisions. The Index is remarkably full, comprising no less than 83 out of a total of 273 pages.

*The Magisterial Law of British Guiana.* By ALFRED JOHN POUND, M.A., Oxon., Barrister-at-Law, and ex-Stipendiary Justice of the Peace in the Colony. Demerara: *Royal Gazette* Establishment. London: J. Haddon and Co. 1877.

Mr. Pound has done a work for which his former brother Justices cannot fail to be grateful to him. He has brought together, in the compass of one portable volume, the law which is administered by our paid and unpaid magistracy in British Guiana. The ordinances, whether relating to Criminal or Civil Jurisdiction, are first set forth, with their respective numbers and dates in the margin, while illustrative decisions, or apposite queries, are appended, in smaller type, but still in the body of the page, thus avoiding foot notes altogether. The subject matter of the ordinances is given in the margin, so that every help is afforded to those consulting the work, whether at home or in Court. Did space admit, we might note many curious features of Colonial life, which relieve the severity of even a work on so dry a subject as Magisterial Law. The Obeah system, for instance, has an entire ordinance to itself, by which its practice is made a misdemeanor, and a similar penalty attaches to the mere consultation of an Obeah. The marriage of "heathen immigrants," a subject which probably gives no little trouble to the magistracy of Guiana, appears to be carefully regulated, and two separate registers are ordered, one of the immigrants who arrive married, and another of marriages contracted by immigrants while in the Colony. There seems to be no fear that members of the bar will not magnify their office in British Guiana as elsewhere, but the palm may probably be given to our South American colony, for the singularity of the claim, recorded by Mr Pound at p. 11, where a barrister, who had applied in his client's name for a tavern license, refused, on the ground of privilege, to give certain evidence. We can scarcely wonder that Snagg, C.J., should have pronounced this advocate not entitled to privilege, "for an application for a license to keep a tavern cannot be said to come within the scope of the employment of a barrister." We observe that, at p. 153, Mr. Pound speaks of the "United Church of England and Ireland," in his definition of a "clerk." Possibly news takes a long time in travelling out to Guiana, and longer still in exercising any influence on the language of the ordinances of the Colonial Government. But ordinances must be taken as they stand, and for those which constitute the local portion of the law of British Guiana, no better guide can be had than Mr. Pound's excellent compendium.



*A Course of Lectures on the Government, Constitution, and Laws of Scotland.* By ALEXANDER ROBERTSON, M.A., Barrister-at-Law. Stevens and Haynes. 1878.

It is something upon which an author should be congratulated in these days when he has found an almost virgin corner of the fertile soil of legal literature, as is the case with Mr. Alexander Robertson in the volume now before us. We think, indeed, that his original idea of expanding the course of lectures which he delivered at the Albert Institute, Dundee, some three years ago, into an elaborate work on Scottish Constitutional History was most in accordance with the requirements of the subject. But if art be long, life is short, and Mr. Robertson has thought it best to make the most of the present day by publishing his Lectures almost verbatim as they were delivered. In this, as in other similar cases, the smoothness of the narrative is, to our mind, somewhat impeded by the recurrence of language only suited to oral delivery, and which might with advantage be omitted or altered in a future edition. There are, of course, many points of general interest to the constitutional lawyer touched upon in the course of Mr. Robertson's book which we have not space here to dwell upon. And we fear we must pass over many passages which we had marked for citation or discussion, contenting ourselves with a few salient points. The identity of order of the greater and lesser barons in Scotland has not, we think, been quite so accurately appreciated by Mr. Robertson as we should have expected. We believe that it is, in part at least, due to this cause that the Act of 1427, allowing the lesser barons to appear in Parliament by representation, remained for a century and a half a dead letter; and the feeling of such an identity was clearly at the bottom of the strenuous resistance, opposed by the territorial baronage, to the claims of precedence over them set up by the new-fangled order of baronets, of which resistance Mr. Robertson will find an amusing instance related by Sir Andrew Agnew, in his "Sheriffs of Galloway." With regard to the Mediæval Scottish Church, it would have been better, perhaps, to have expressed the relation between Rome and Scotland by saying, as the Popes themselves said, that the Scottish Church was the "special daughter of the Holy See." Mediæval churchmen and laymen, in fact, played off the Pope against the Archbishop of York, who was constantly trying to increase his ecclesiastical dignity by claiming metropolitan privileges over Scotland. We should have been glad if Mr. Robertson had gone at somewhat greater detail into the Peerage

Law of Scotland, which presents many intricate features, interesting to the Constitutional historian. We do not feel sure that we quite understand to what cases our author is referring when he says that if a person to whom the King of Scotland issued a writ of summons "never took his seat, neither he nor his heirs were entitled to the honours of the peerage." *Per contra*, we do know that three Lords Spynie sat, and that there is no evidence of anything more in their case than the King's expression of an intention to erect their lands of Spynie into "a temporal lordship, to be called the Barony of Spynie in all time coming." The Scottish Life Peerages, created from time to time at dates extending from 1427 to 1635, afford a useful argument by analogy, which Mr. Robertson applies to the suggestion of similar creations to keep up the judicial character of the House of Lords as an appellate tribunal. The analogy has been accepted and applied since Mr. Robertson's Lectures were delivered, and we see no reason to doubt that it will work satisfactorily. We quite think, with Mr. Robertson, that it was the only course open if the House was to maintain its appellate jurisdiction. The case of the Dukedom of Montrose, created in the person of the fifth Earl of Crawford, however, was one which called for some legal comment, when introduced as an instance of a Life Peerage. We should like to see Mr. Robertson enhance the interest of his work by discussing many of these questions in an enlarged edition of his useful manual of Scottish Constitutional Law.

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*Treatise on the Law of Arbitration in Scotland.* By JOHN MONTGOMERIE BELL, Esq., Advocate. Second Edition. Edinburgh: T. & T. Clark. 1877.

The appearance of a second edition of the late Mr. Montgomerie Bell's book on Arbitration is the best testimony to its worth. This edition, we are informed, has had the benefit of a few formal corrections by the author, but the work of revision has been mainly performed, and we may say performed well, by Mr. John Kirkpatrick, of the Scotch bar. Mr. Kirkpatrick's contributions are mostly confined to the notes, in which the last decisions bearing on the points discussed in the text, are carefully and accurately noted up.

The principle of substituting a private tribunal for a Court of Law in the settlement of disputes has, on the whole, had a more successful history in Scotland than in England, and Mr. Bell

writes about Arbitration in more enthusiastic terms than an English lawyer would be likely to use. The Introduction gives a very interesting sketch of its history, beginning with "that famous award which was delivered on Mount Ida, by the royal shepherd Paris, on the competing claims of Juno, Pallas, and Venus, contending for the prize of beauty." Mr. Bell notices the place occupied by Arbitration in Roman Law, and in the legal systems of England, Scotland, and Continental countries. If Arbitration has assumed less importance in England than in some other countries, the fact may be accounted for, not only by the natural dislike of competing jurisdictions on the part of the Courts, but by the high degree of confidence which litigants have always placed in the decisions of the established tribunals. Lord Campbell was bold enough to say that the objection to private tribunals on the ground of public policy had its origin in the interests of the judges, for, "as formerly the emoluments of the judges depended mainly, or almost entirely on fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall for the division of the spoil." Accordingly the Courts have been not unwilling to strike at the essential feature of Arbitration—the finality of the award—by reviewing more or less directly the merits of the Arbitrator's decision, as offering a loop-hole for one of the parties to repudiate the submission. The difference between the Scotch and English practice on these points is carefully traced. The book is, in fact, throughout copiously illustrated by references to English law, but we cannot detect anything like that subserviency to English opinion which, according to an English jurist (Sir George Bowyer), is mining the ancient jurisprudence of Scotland. Scotch lawyers have not yet got into the habit of writing pure case-law, and basing every sentence on the *ipsissima dicta* of a judge. The book before us is as good an example as could be desired of the better sort of legal authorship, which is, perhaps, more common at the Scotch bar than at our own. We certainly produce every year a very large number of text-books, but they are in most cases a mere compilation of marginal notes, and the nominal author can hardly be held responsible for even the language employed. Although there are about 3,000 cases cited in Mr. Bell's volume, the book contains an independent exposition of the subject as it shaped itself in the author's mind.

The treatise is divided into six books, under which the whole

subject of Arbitration is systematically mapped out. A copious appendix, containing forms for submission in various cases, will be found practically useful.

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*The Aryan Household; Its Structure and its Development.* An Introduction to Comparative Jurisprudence. By W. E. HEARN, LL.D., Dean of the Faculty of Law, University of Melbourne. London: Longmans. Melbourne: G. Robertson. 1879.

We welcome with great pleasure in the Dean of the Law Faculty of one of our youngest Colonial Universities a fellow-worker with the distinguished European Scholars who have led the van in the interesting science of Comparative Jurisprudence. It is as yet a somewhat young science, and would be in a much more crude state than it is but for the power of the master-minds which have been brought to bear upon it abroad and at home. Dr. Hearn is fortunate in enjoying the light which has been cast upon various branches of his subject by Sir Henry Maine, M. Fustel de Coulanges, M. de Laveleye, and other eminent pioneers in this field of study. It might have been expected, perhaps, that Dr. Hearn's position would have led to his discussing Aryan questions somewhat under the influence of non-Aryan surroundings. This, however, is not the case. Our author confines himself strictly to the study of Aryan Institutions, and treats them from an entirely Aryan point of view. Very often, of course, the results at which Dr. Hearn arrives might be stated in the "ipsissima verba" of his European predecessors. This fact is not without significance as showing that, under very different surroundings, the transplanted Aryan sees no reason for doubting the scientific truth of the general conclusions which have been arrived at by scholars in Aryan lands. Had Dr. Hearn's book been composed in Europe, and for European students, it would no doubt have been cast in a somewhat different, and probably less bulky, shape. With a considerable amount of the matter of our author's book we, in this Hemisphere, are necessarily more familiar than our Australian fellow-subjects. But in order to extend to the Colonial Bar-students the benefits of European Scientific Jurisprudence, Dr. Hearn was clearly right in assuming the novelty of his subject, for the purposes of his Chair, and setting out at length before his hearers much which in this country might have been put more concisely. It would be interesting, did space admit, to institute a

comparison between some of Dr. Hearn's conclusions and the views put forward in Professor Max Müller's recent Chapter-house Lectures. If we recollect rightly the substance of one of the Professor's arguments, he pleaded, and that most eloquently, in favour of Law as a *primary* conception of the Aryan races. Dr. Hearn, on the other hand, seems to make it but a *secondary* conception among them. We must confess that on this point we agree with the Professor of Comparative Philology rather than with the Dean of the Faculty of Law. Dr. Hearn says in most decided language that the Aryans had "no word for law." Professor Max Muller, if we remember rightly, found such a word in "Rita." Here, again, we differ from the Melbourne Dean and agree with the Oxford Professor. And we carry up our belief in the existence of the conception of Law to a more remote period than Dr. Hearn, because we believe that when the Clan and the Family were in existence there was Law. Wherever there was the conception of an organised society with a recognised head, whether Tribe or Clan Chief, or House or Family Father, there, to our minds, was a definite social, if not strictly political, superior, whose commands obliged the Members of the Clan, Tribe, Household, or Family, within the sense of Austin's definition. Where there was a Hearth, there was a "*Forum domesticum*:" where there was a Family, there was a Family Law as well as a Family Worship. If there was, as Dr. Hearn puts it, no organised Aryan priesthood, it was simply because the House Father was the priest of the Household. If there was no organized Judicature, it was simply because the Clan Chief and the House Father, the "*Paterfamilias*," were alike, in their several degrees, the Judicial authorities of their Clan or Tribe, and of their Household. The functions of Priest and Judge were combined in the same person, and the descent of those functions being regulated by the Customary Law of Archaic Society, there was no need for a separate organisation. Everybody knew where to find his Judge and his Priest, as in the later days, when the King sat in the gate to give judgment. But to say of such a period that there was no Law, seems to us misleading. In later times, of course, when the State had acquired a jural personality, with rights over its individual members, those members, being also members of the Family, became the subjects of two Laws, the Law of the Family, the Primary Law, and the Law of the State, the Secondary Law. In those cases, strikingly exemplified in Roman History, the

State, as might have been expected, gained the day over the Family, and surely, though it may be unconsciously, hastened the break-up of the old law of the House-Father. This is, of course, a phenomenon not peculiar to the decay of the Roman "Patria Potestas;" it is to be seen in operation any day when the interests of the individual come in conflict with those of the State, or where Archaic Family and Household Law comes into conflict with Modern Law and the Modern State. We shall probably be able to watch something of this conflict in Bosnia and Herzegovina under their new rulers. We have not pretended to do more than touch upon a few points in Dr. Hearn's interesting volume. But it deserves to be studied in this country, as well as in Australia, as the work of an earnest and thoughtful writer on the very important juridical questions which are bound up with the History of Aryan Law and Aryan Institutions.

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*The Law of Joint Ownership and Partition of Real Estate.* By EDWARD JOHN FOSTER, M.A., late of Christ Church, Oxford. Stevens & Sons. 1878.

The law relating to the various kinds of joint ownership vested in joint tenants, coparceners, tenants in common, and tenants by entireties, seems to carry back the imagination to the primitive times, when ownership of individuals in severalty had not as yet been evolved out of the common ownership of the family, the sept, and the tribe. In English law joint ownership very early meets the student of Real Property law. Bracton employs the generic term "participes" to indicate all varieties of joint owners, of whom we are told "totum tenent et nihil tenent, scilicet totum in communi et nihil separatim per se." Much quaint and ancient legal lore still lingers about the subject, and also, unfortunately, some doctrines which having outlived their *raison d'être* are now not merely useless but mischievous. At the present day, almost the only instance where a joint tenancy is a convenience is in the case of mortgagees who are trustees. This being so, it is to be regretted, as was well remarked by Vice-Chancellor Page Wood (Lord Hatherley), in *Williams v. Hensman*, that in questions of construction, as between joint tenancy and tenancy in common, the Legislature has not made it the rule that express words shall be required to create a joint tenancy, in place of the contrary rule which is established, that words pointing to severalty of interest

are necessary to constitute a tenancy in common. When the Criminal Code has become *un fait accompli*, we shall not despair of seeing our law of Real Property codified, and, in the process, simplified and further amended. Mr. Foster may be congratulated on having produced a very satisfactory *vade-mecum* on the Law of Joint Ownership and Partition. He has taken considerable pains to make his treatise practically useful, and has combined within the fifteen chapters into which his book is divided, brevity of statement with completeness of treatment. Much convenient information has been brought together in an Appendix, comprising the Partition Acts, 1868 and 1876; Forms of Judgments and Orders in Actions (Mr. Foster still calls them "suits") for Partition; the Inclosure Acts, 1845 to 1876, so far as they relate to Partition; Forms of Partition by Inclosure Commissioners; and an Index to Precedents of Instruments relating to Joint Ownership and Partition, extracted from Copinger's useful Index to Conveyancing Precedents.

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*A Digest of the Principles of the Law of Trusts and Trustees.* By HENRY GODEFROI, Barrister-at-Law. Stevens and Sons. 1879.

This book, though not a digest, its author explains, in the sense in which jurists use the term, is yet a collection, and almost solely a collection of what a Roman Jurist would have called "*sententia et opiniones eorum quibus permissum est jura condere.*" From this point of view it is a work of great utility to the practitioner, especially as the Table of Cases cited gives reference to every series of Reports in which the cases will be found. This is a principle which we have constantly advocated, and which we are glad to see carried out in a book dealing with so important and at the present moment absorbing a question as that of the Law of Trusts and Trustees. The search after the principles of the law is now-a-days so much more in vogue than formerly that we have no doubt Mr. Godefroi's book will be consulted on both sides of the Tweed. Our readers may see for themselves how frequently we report that "English cases were cited" in the Court of Session. The wider the range of the appeal to common legal principles, the better, we believe, will both advocates and suitors be satisfied. Mr. Godefroi's work is one which gives no scope for literary embellishments, but as a straightforward digest of legal principles it will be found a useful companion for Court and Chambers.

*Smith's Law of Contracts.* Seventh Edition. By VINCENT T. THOMPSON, M.A., of Lincoln's Inn, and of the North-Eastern Circuit, Esq., Barrister-at-Law. Stevens and Sons. 1878.

A seventh edition of this well-known work demands but little comment from us. Originally delivered in the form of lectures at the Law Institute in 1842, by the late Mr. John William Smith, the learned author of "Leading Cases," &c., and first published in 1846, the lapse of more than thirty years has only seemed to augment its popularity. The present editor while taking pains to bring the book up to the current state of the law by noting all legislative changes, and the effect of recent decided cases, has wisely refrained as much as possible from unduly increasing the bulk of the volume. His treatment of the very important changes in the law effected by the Factors' Act, 1877, and their relation to the previously decided cases of *Fuentes v. Montis*, *Johnson v. Credit Lyonnais Co.*, *Jenkyns v. Osborne*, and *Van Casteel v. Booker* (pp. 43-52) is at once concise and sufficient for the purpose. On the whole this new edition will, we believe, be found quite equal to its predecessors.

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*The Law of Parliamentary and Municipal Registration.* By A. C. NICOLL and A. J. FLAXMAN, Barristers-at-Law. Second Edition. Knight & Co. 1878.

*The Parliamentary and Municipal Registration Act, 1878*, with an Introduction, Notes, &c. By G. LATHOM BROWNE, Barrister-at-Law. Stevens & Sons. 1878.

The usefulness of the work which Messrs. Nicoll and Flaxman had set before them has been, we are glad to see, duly appreciated by the large and varied class of persons interested in the subject either as occupiers, lodgers, and overseers, or officers of City Companies. The more study we have given to it the more we have been convinced that notwithstanding the efforts of Mr. Marten, Q.C., Sir Charles Dilke, and Sir H. Drummond Wolff, on different sides of the House, much yet remains to be done by our Legislature to render this very important subject adequately clear and intelligible. Messrs. Nicoll and Flaxman give the utmost assistance they can by careful annotation, embodying recent leading decisions, and by furnishing tabulated schemes of the duties of Registration Officers, the Statutes under which they are to be fulfilled, and the dates within which they must be carried out. The number of different lists to be prepared within slightly different dates



strikes us as one of the needlessly cumbersome features of the present state of the Law of Registration. And we can see no valid reason for the extreme favour shown to objections made by Overseers, of which Mr. Lathom Browne remarks that their introduction into Borough Registration is "of doubtful value." The powers of the Revising Barristers themselves have sometimes appeared to the lay public to be arbitrarily exercised. We must confess that not a little of the language of the Statutes bearing upon those powers seems to us still to be obscure. There is yet plenty of work for members desiring to aid the good cause of the Amendment of the Law of Parliamentary Registration, to whichever side of the House they may belong. Messrs. Nicoll & Flaxman, as in their first edition, set forth all sections both of the latest and of previous Acts in force at the present time, while Mr. Lathom Browne confines himself to the Act of 1878, with references to former Legislation in his Notes, and in his Introduction, which last forms a brief but clear epitome. To the Revising Barrister, as well as to the Overseer or other Registration Officer, this new edition of the work of Messrs. Nicoll & Flaxman will commend itself by its useful Tables, its consolidation of the various existing legislations, and its constant citation from recent decisions. To those practitioners who want a short but, at the same time, critical manual of the Registration Law of 1878, Mr. Lathom Browne's book will be a convenient and intelligent "aide-mémoire."

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*Economics for Beginners.* By H. DUNNING MACLEOD, M.A., Barrister-at-law. Longmans. 1878.

We have more than once had occasion to express our high esteem for Mr. H. Dunning Macleod as at once a clear and philosophical writer on the science of economics. If the reputation which he has long since acquired both at home and abroad needed any increase, we think that his present work would provide a sufficient title for it. To write an elaborate work may often be easier than to write a primer, and to cater for the advanced student is both pleasanter, and in some respects easier, than to adapt oneself to the wants of a beginner. Mr. Macleod, however, has written a distinctly able book, which the student may take up in full confidence of understanding its plain, though strictly scientific, language, and which the jurist and advanced economist may yet study with profit. We could

wish that a copy of "Economics for Beginners" were placed in the library of every one of the numerous working men's clubs and institutes which are starting up throughout the country. Both masters and men would profit by the attentive perusal of Mr. Macleod's earnest words on the relation between Capital and Labour, while at the same time his book contains much that cannot fail to be of value to the lawyer. Mr. Macleod is one of the few among us who keep in view that connection between jurisprudence and economics which our continental neighbours recognise in their examinations for admission to the bar.

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*Consolidated Abstracts of the Highway Acts, 1862-4, the Locomotive Acts, 1861-5, and the Highways and Locomotives (Amendment) Acts, 1878.* By JAMES A. FOOT, M.A., Barrister-at-Law. Shaw and Sons. 1879.

We have here an attempt made, and skilfully and successfully made, to codify the Highway Acts. The task has been undertaken by no untried hand. Mr. Foot was the coadjutor of Mr. Wood in that first attempt to revise the Statute Law, which resulted in a volume that every lawyer has been ready to welcome. The result here produced might, therefore, have been anticipated, when it was known by whom the labour was undertaken. This codification of statutes treating of one definite subject is a most acceptable beginning of what our successors may, perhaps, see attempted with regard to the whole law, though there, of course, something like a digest must be combined with it. For with all our readiness to be pleased with new made law of the statutory kind, it is impossible to avoid saying that the old rules of law, and the old decisions upon them, often exhibit, in a higher degree, than do modern statutory provisions, the true principles on which legislation should be founded. Mr. Foot's book is necessarily one which does not offer opportunities for quotation. Its principle of combining, in a complete form, the various provisions of the recent Highway Acts is one which recommends it alike to the student and to the practising lawyer, and that principle has been carefully carried into execution.

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*A Compendium of Precedents in Conveyancing.* By THOMAS KEY, one of the Editors of "Davidson's Precedents," and HOWARD WARBURTON ELPHINSTONE, both of Lincoln's Inn, Barristers-at-Law. Maxwell & Son. 1878.

With the standard works of Davidson and Prideaux already in possession of the field, there might seem at first sight to be hardly room for these two goodly volumes of Messieurs Key and Elphinstone; but an examination of the work has convinced us that it fully supplies a mass of fresh material which every conveyancer will find a most useful addition to his library. The forms are far more numerous than the precedents which are drafted by way of reference to them. They are professedly "modelled mainly on those in general use among conveyancers of the modern school," whose characteristic is clearness and conciseness, as distinguished from the prolixity and verbosity of the older generation; and in many cases both concise and full forms are given. Both the precedents and forms have evidently been selected with much discrimination, and are carefully and accurately edited. By making use of the ordinary contractions much space has been saved, so that the Compendium at the same time covers a very wide range, and is yet kept within convenient limits. The notes are very short, but practical and to the point, and references are given to "Davidson's Precedents," and other works on conveyancing, for fuller information of the law and practice. We can thoroughly recommend the work to both branches of the profession, but more especially to solicitors, who will find it a valuable aid for ready use in all ordinary conveyancing practice.

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[ *Digest of the Hindu Law of Inheritance and Partition*, from the opinions of the Shastris in the Bombay Presidency. Second edition, with Introductions, Notes, and Appendix, by RAYMOND WEST and JOHANN GEORG BÜHLER. Bombay Education Society's Press. 1878. (London: Trübner.)

We have here what will, we cannot doubt, prove a useful addition to the library both of judges and magistrates, and members of the Bar in India, and of counsel engaged in Indian cases before the Privy Council. Messrs. West and Bühler present us with a goodly volume of "*Responsa Prudentum*" from western India, devoted to an important and often perplexing branch of law. In fulfilling their functions as editors they have added remarks wherever the "*Responsa*" seemed to require quotation, discussion, or explanation. Their references, in the excursive which they prefix to all the principal divisions of the work, cover a wide area of Indian and European writers on the subjects with which they have to deal. There are

occasional singularities in these references, which are probably due to difficulties with native compositors. At p. 426 we have "Coulanges, Op. Cité," and at p. 428 "Coulanges, Op. Ct." both of which were evidently intended to stand "Op. Cit.," the title of the work of M. Fustel de Coulanges, "*La Cité Antique*," had been already quoted on the former page. But we are less surprised by such occasional shortcomings than by the general excellence of the typography, which adds to the comfort of consulting Messrs. West and Bühler's valuable Digest.

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*The Elementary Education Acts, 1870-73-74-76, with Introduction, Notes, and Appendix.* By HUGH OWEN, Jun., Barrister-at-Law. 14th Edition. Knight & Co. 1879.

The practical acquaintance which Mr. Hugh Owen, Jun., has for some years enjoyed with all subjects connected with our new National scheme of education, is sufficient to ensure the continued popularity of his work on the Education Acts. The Introduction amounts in the latest Edition to some fifty pages and comprises all the information that we can think of as likely to be needed by those who have, in their various capacities, to deal with the operation of the Elementary Education Act. The Acts regulating the education of children employed in labour, whether under the Factory or Coal Mines Legislation, are duly set forth; and we believe the work, as a whole, to be one which ought to find its way into the hands of all who, whether as employers of labour, or as interested in rural education, find it necessary to have at hand the best information on the Law of National Education.

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*The Principles of Bankruptcy:* with an Appendix containing the General Rules, 1870-71-73-78; a Scale of Costs, and the Bills of Sale Act, 1878. By RICHARD RINGWOOD, B.A., Barrister-at-Law, late Scholar T.C.D. Stevens & Haynes. 1879.

The author of this convenient hand-book sees the points upon which we insist elsewhere in regard to the chief aim of an improved system of Bankruptcy Law which should deserve the title of National. There is much yet to be done before we can be content with our administration of that branch of the Law. It is of course to be understood, that neither expenditure nor cheap

ess will, or can, take the place of equitableness in the broader and less technical sense of the term. But that which our business in the United States have long been aiming at, viz., uniformity of Bankruptcy Legislation, is clearly the principal aim of our own schemes of amendment in this portion of our law. There can be no question that a sound measure of reform is greatly needed, and would be welcomed by all parties in the United Kingdom. Pending any amendment, it is necessary to know the Law as it is, and those who have to deal with the subject in any of its practical legal aspects will do well to consult Mr. Ringwood's unpretending but useful volume.

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#### SMALLER BOOKS AND PAMPHLETS.

In *A Digest of the Law of Probate Duty*, by A. H. Leach, Barrister-at-Law, and Fellow of All Souls College, Oxford. (W. Maxwell & Son, 1878), we have not only a useful manual compiled for a very intricate, in fact typically intricate, branch of Law, but also some sound observations on the relation of digests of particular portions of Law to the general subject of codification. Mr. Leach excuses himself for making Probate Law the subject of this trial of a "prentice hand," by saying that it appeared to him the most suitable in some respects for such an attempt. It may at any rate be said of Mr. Leach that he has expended much pains upon his work, and that not only in his Statements of the Law, but in those illustrations which Sir James Stephen has shown to be so valuable in a digest, and of which Mr. Leach says truly that they "clothe the dry bones of the Law in flesh and blood."

*The Dean's English*, by G. Washington Moon, Member of the Council of the Royal Society of Literature (Hatchards, 1878), is the eleventh edition of a work whose popularity has lasted beyond the controversy between its author and the late Dean of London, which gave rise to the original publication. In pleading earnestly for the maintenance of the purity of the English language, Mr. Moon has the high authority of John Milton for believing that it is not to be considered "Of small importance what language, pure or corrupt, a people has, or what is their customary degree of propriety in speaking it, a matter which oftener than once was the salvation of Athens." It will not be Mr. Moon's fault if England stands not where she did.

Mr. E. H. Bedford, indefatigable in his labours on behalf of the artied clerk, has supervised a new edition of Mosely's *Handy-book of Elementary Law* (Butterworths, 1878). It will certainly not be the fault of either author or editor, if the years spent under articles are not well spent, and if the work required to lay a sound foundation of legal knowledge is not done with that "thoroughness" of which they so emphatically declare the necessity. In a future edition, Mr. Bedford would do well to introduce a new precedent in lieu of the Draft Conveyance in Fee given at page 11, and which he himself acknowledges to be somewhat antiquated.

Mr. Underhill has brought out a Second Edition of his work on the *Law of Torts* (Butterworths, 1878), in which he has been assisted by Mr. C. C. M. Plumptre. The new volume, while containing much fresh matter, remains a handy guide to the important but complicated branch of law to which it relates, and will be found conveniently arranged for reference by the practitioner no less than the student. Chapters III. and XII. on the Liability of Masters, and on Infringement of Patents and Copyright, deal briefly but clearly with subjects of constant recurrence in Courts. Mr. Underhill carries out the same principle of treatment in his new manual of the *Law of Trusts and Trustees* (Butterworths, 1878), and we think with great success. Starting with the necessary definitions, he proceeds to throw the law into the shape of articles, after the fashion of a code, and appends to each article such observations and illustrations as may seem required to elucidate the law, thus acting avowedly on Sir James Stephen's dictum, that "the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles."

Mr. G. F. Chambers has brought out two new volumes. In his *Law Relating to Highways and Bridges and the Lighting of Rural Parishes* (Stevens and Sons, 1878), while so much is made of the Watching and Lighting Act, 3 & 4 Wm. IV., we are surprised to find so little said of the power of rural authorities to become urban authorities, in which case the Act of Wm. IV. is superseded by the Public Health Act, 1875. The other volume contains the *Law Relating to Rates and Rating* (Stevens and Sons, 1878). In both the most striking feature may be said to be the pictorial illustrations, the Royal Arms, with lion and unicorn complete, being depicted on page after page, while the

igest, or what constitutes a Digest in Mr. Chambers's eyes, occupies a relatively small space.

*Leading Statutes Summarised* (Stevens & Haynes, 1878), by Ernest C. Thomas, late Bacon Scholar of Gray's Inn, will doubtless prove of much use to students, for whom it is intended. The principal Acts in the Statute Book are grouped under the two main divisions of (I.) Common Law (with Bankruptcy and Criminal Law), and (II.) Equity and Conveyancing. Within these divisions the arrangement seems to us somewhat confused, being what the author terms "chronological, except that statutes on the same subject are collected together where the subject is first handled." A strictly topical arrangement would have been far preferable. Still, any student who with this brief summary as a guide, carefully studies the actual enactments themselves in the Revised Edition of the Statutes cannot fail to gain a very considerable acquaintance with every branch of English Law.

Messrs. Henderson, Gillespie, and Johnston, have brought out the concluding Part of their valuable *Analytical Digest of Cases decided in the Supreme Courts in Scotland, and on Appeal in the House of Lords* (Edinburgh: T. & T. Clark, 1878). The present and concluding part commences with the peculiarly Scotch title of "Service of Heirs," and practically concludes with the important subject of "Writs." The very full Index appended enables the reader to see at once the Report, or Reports, to which he is referred from the Digest, and under the heading "Statute" will be found a list of Laws from 1469 to 1876, with the numbers of the relative cases. The work, as now completed, forms a useful addition to legal literature.

Mr. Darcy B. Wilson, M.A., of Balliol College, Oxford, Barrister-at-Law, has brought together in the compass of a very handy little volume the *Law and Practice under the Bills of the Acts*, 1854, 1866, and 1878 (*Law Times Office*, 1879). The notation of the Act of 1878 commences on p. 21, and from that page to the close there will be found constant references to cases, notes, illustrative or declaratory of the Law, and precedents well arranged for readiness of reference. The Agricultural, Mechanical, and Mineral interests are duly represented in the precedents, as well as the more ordinary requirements of every-day life.

Mr. Vesey Fitzgerald, B.A., Barrister-at-Law, whose name

will be familiar to readers of the *Law Magazine and Review*, and who has made himself a position as an authority on Sanitary Law, publishes in a most portable form a small volume of *Notes of Statutes and Legal Decisions affecting the Public Health Act, 1875*, from 1875 to 1878 inclusive (Longmans, 1879). Those who possess Mr. Vesey Fitzgerald's Edition of the Act of 1875 will not fail to procure this useful, we might say, indispensable sequel.

Mr. H. H. Walker, of the Judgment Department, Exchequer Division, is from his official status eminently well qualified to deal with the subject which he undertakes to illustrate in his *Practice on Signing Judgment in the High Court of Justice* (Stevens & Sons, 1879). The last thirty pages of his book are devoted to Forms. We cannot say that we like the formula "J. Lindley," and "J. Blackburn," which Mr. Walker employs instead of the usual "Lindley, J." and "Blackburn, J." There is no saving of space, while there is the obvious inconvenience of the apparent introduction of the initial of a Christian name.

Mr. Wyatt Hart and Mr. E. Eiloart, Barristers-at-Law, have devoted themselves to the extraction from recent Judgments of the *Rules* now obtaining in the High Court of Justice relating to the *Law of Discovery and Inspection* (W. Maxwell & Son, 1879). Wherever the Rules thus formulated have appeared to require comment, this has been added beneath the text by the editors, who deserve praise for the care which they have bestowed on a work which they have yet brought within pocket dimensions.

Mr. G. Manly Wetherfield's *Concise View of Liquidations and Compositions* (Longmans, 1878) has reached a second edition, in which he has included a Precedent of a Solicitor's Bill of Costs under sec. 126 of the Bankruptcy Act, 1869.

From the Delegates of the University Press, Oxford, we receive a new instalment of the *Select Titles from the Digest*, edited by Professor Holland and Mr. Shadwell (Part IV., No. 1. Oxford, Clarendon Press, 1878). The present issue contains the first portion of those Titles which deal with the Law of Obligations, and extends as far as xlv. 1, "*De Verborum Obligationibus*." Having on a previous occasion indicated the points on which we differ from the judgment of the learned editors in their present recension, we need only say that in all other respects



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work has our hearty commendation, and is well known in these days of increased study.

*A Minute Digest of Important Decisions of the House of Lords, 1877-8* (*Law Times Office*), we have the credit of contributing towards the embodying, in a handy form, of many important points decided on Appeal during the year ending August, 1878. It would have been more useful if the whole had the "Minute Digest" equalled the whole of the *Law Reports*, instead of only a selection, and if the cases cited, we should have preferred to find *Pratt v. Floyer* under A, and "The *Francis and Carter*" under T, where they actually appear.

E. Preston publishes the "Third Edition of *The Law of Money*, a Handy Book for Heirs-at-Law," by Allen, and Reeves and Turner, 1878), which contains many curious, and some rather startling, facts relating to the Law of Money and Property.

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## Quarterly Notes.

Of recent years considerable interest has been excited with reference to ancient records, both public and private. It is to be feared, however, that much valuable matter has from neglect been allowed to perish. On a recent appointment to the office of Sheriff Clerk of the County of Renfrew, the new incumbent, Mr. W. Hector, described the County Record Room as "a place in confusion; the floor strewn with heaps of disarranged papers, which, with others in closed presses, were covered with dust, and in a state of decay from damp and want of ventilation." Mr. Hector, with praiseworthy enterprise and industry, has succeeded in rescuing many important writings from oblivion, and has arranged them as far back as the middle of the seventeenth century. In 1876, Mr. Hector published a volume of "Selections from the Judicial Records of Renfrewshire," and he has since added another volume, including many *fac-similes* of ancient writings. Much of the matter thus recovered is of general interest to the legal student, as well as the genealogist and antiquary. We select a few specimens, illustrating judicial procedure in Scotland in the seventeenth century. In 1694, a merchant in Paisley was convicted of the crime of wife-beating. The Libel, or Indictment, is such a curiosity of its kind that we are induced to give an extract in a somewhat modernised form. It sets forth that the accused, "in contempt of the laws of this kingdom and the perpetual practice thereof, and casting off all fear of God, dread, or regard of said laws, most unchristianly and inhumanly did fall upon the person of his spouse, and with his fists gave her many blue strokes, and did ding (knock) her to the ground, and drag her alongst the same, and, not being satisfied therewith, he did proceed to a higher degree of inhumanity and unnaturality—to wit, he did thrust and ding (knock) her forth of his house door, over a high stone, in falling over of which she was most dangerously hurt, blooded, and bruised, and *by all which violence he exceeded the due moderation of correction towards his said spouse, and has most uncivilly gone beyond the bounds thereof*, thereby transgressing the laws, and has incurred the pains thereof." Renfrewshire and the ancient town of Paisley were famous for swarms of witches, and, accordingly, for their prosecution. On 8th April, 1692, a criminal case

reported against certain persons who had defamed others by saying they were in use to "*drink the health of the Devil.*" The Judicial Records of Renfrewshire give evidence of the extreme severity of the laws against vagrancy. In 1700, a poor wanderer was ordered to be tied to a pillar on the prison stair of Paisley and burned in the face with a burning iron, then to be taken to certain points in the town and whipped, and thereafter to be banished the shire, and *not to return thereto under the pain of death.* The Game Laws were most stringent at this period, and their administration very severe. The whole of the inhabitants of a parish were brought up on one occasion and made to purge themselves on oath of contravention of the Game Laws. In 1716, fifty-four tenant-farmers of one parish, and fifty-two from another, were thus called on to justify themselves on oath. Those who refused to swear were convicted; those who admitted an oath, to any extent, shared the same fate, but those who swore in the *negative* escaped. The admissions are sometimes of strange import, such as "Confessed to shooting a duke (*sic*) and a rake, a hare and two doves, a woodcock, a small teal; shot a dove, but does not know whether he killed." The Renfrewshire Records show how limited was the extent of the franchise in olden days. In 1748 the Freeholders in the large county of Renfrew numbered only 39, but at the passing of the Reform Act of 1833 they had increased to 132. In 1874 they amounted to 839.

In the varied enumeration of prosecution for crimes there is reported one in 1721, for *murder*—of a *horse*. The major proposition of the indictment is as follows: "That where any person with wilfully and of set purpose stick, butt, or stab another person's horse, without the owner's consent, with a knife, sword, or other invasive weapon, especially where the wound given thereby proveth mortall, and the horse dyeth within a little time thereafter, the actor becometh guilty of the *murder* of the said *horse*, and is liable in condign punishment in his person and goods, being a crime of a *high nature*." The minor proposition in this logical document is worthy of its major, setting forth the particulars of the murder, even to the accused having been seen "*dighting the foresaid knife.*"

We will only give one other instance of the curiosities of Sheriff's Justice in Scotland in former times. In 1685, a party, with concurrence of the Procurator-Fiscal, charged two men with an assault before the Sheriff. The Sheriff found the assault the only charge not proved, but nevertheless he convicted not only

the accused parties but the complainer himself, as all three guilty of a breach of the peace (not charged), and imposed upon each of them a heavy fine, ordering that they should remain in prison until the fines were paid.

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The well-known and highly-esteemed American jurist, Mr. W. Beach Lawrence, sends us an interesting and judicially impartial paper on the *International Obligations of the United States*, reprinted from the "North American Review," July—August, 1878. These Obligations are regarded chiefly from the point of view of neutrality, and Mr. Lawrence deals with various questions of lively interest in Public International Law, such as the Declaration of Paris, the Three Rules of Washington, the Captures of British Vessels effected during the War of Secession, and the, at one time, threatening question of the Cimbria. Mr. Beach Lawrence indicates that he shares generally the views of Sir Travers Twiss in regard to the powers left to the signatories of the Declaration which abolished "La Course." He points out how entirely the doctrine of "continuous voyages" is opposed to the terms of that Declaration, as well as to the previous Treaty obligations, and the contention and practice of the United States. With regard to the vessels which entered U.S.A. ports under the German flag, with officers and men destined, it was averred, for Russian cruisers, to be purchased and fitted out in the United States, we may do well to bear in mind Mr. Beach Lawrence's just observation that "Neutrality *ex vi termini* implies belligerency; and a breach of neutrality can only occur with regard to a matter arising during a war."

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We are glad to observe that the necessity for taking steps for the preservation of our old Parish Registers has not escaped the notice of perhaps the most important of provincial Law Societies. The Committee of the Incorporated Law Society of Liverpool, in their Report, presented to the fifty-first annual general meeting of the Society on the 6th November last, call special attention to the "Preservation of Parochial Registers and Ecclesiastical Documents," and announce that they "supported Mr. Whitwell's motion in the House of Commons for a Select Committee to inquire into this subject, which is one of considerable moment to the profession and their clients." Solicitors, much more frequently than barristers, are brought by their

professional avocations into actual contact with the original registers, and thus acquire a personal knowledge of that destruction, mutilation, and interpolation so graphically described by Mr. Taswell-Langmead in our number for May last. It is to be hoped that other Provincial Law Societies, and also the incorporated Law Society of the United Kingdom, will follow the good example set by their Liverpool *confreres*; and that in the new Session of Parliament the legal members of both branches of the profession will heartily support Mr. Whitwell's motion for a Select Committee, should that gentleman again bring it forward, as we trust he will, or, in default, themselves call the attention of the House to this important and urgent subject.

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The International Literary Congress, held in Paris in June last, under the auspices of the "Société des Gens de Lettres de France," and under the Presidency of Victor Hugo and Edmond About, has had for its first practical result the foundation of an International Literary Association. With the general object of such an Association, viz., the International Protection of the Rights of Authors, we have every sympathy. With its desire to procure the Amendment of the National Copyright Laws of the several countries of the civilised world, so as to secure to authors their just rights, we must needs also heartily sympathise. But we must take exception, *in limine*, to the extreme views with which the Association has quite unnecessarily, and therefore, to our mind, wrongly, identified itself. There was no necessity for the Association to commit itself to the speculative view that Copyright is antecedent to Law, and not created by it (*Le droit de l'auteur sur son œuvre constitue, non une concession de la loi, mais une des formes de la propriété, que le Législateur doit garantir*), when, according to the Juridical Doctrine of most of the countries represented in the body of the Association, the reverse is the doctrine of the Courts. We fear that this will impede the prospect of utility to a really good cause which the Association would otherwise have before it. And along with this objection to the adoption, as a basis of action, of the theory that Copyright is antecedent to Law and not created by it, we must mention another objection, viz., to the adoption, also as a basis of action, of the theory of the perpetuity of Copyright. This is contrary to the existing Legislations of, we believe, every European country, and we think places the Association in a position of needless antagonism. We shall be curious to see

how these doctrines are received in this country when the Congress, proposed to be held by the Association, meets in London in June next. We observe that the Association appears to have some idea that it may become the recognised translating body of the World. This is a considerable ambition. Whether authors and publishers will be satisfied to hand over the right of translation to the International Association is a question which time alone can solve. Meanwhile, the first number of its "Bulletin" (for which we are indebted to the courtesy of Mr. Blanchard Jerrold, the Correspondent in England of the International Literary Association) is well deserving of careful perusal.

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The urgent necessity for amendment of the Bankruptcy Laws is shown by the following memorial which has been forwarded by the leading bankers and merchants of the City of London to the Earl of Beaconsfield :—

" The Memorial of the undersigned Bankers and Merchants  
of the City of London

"Sheweth,—That your memorialists are, and have been for many years, largely engaged in banking and commerce, and by reason of the extent and character of their transactions, have had ample means of observing the effect of the Bankruptcy Act of 1869, both as regards creditors and debtors ; and your memorialists have to represent to your Lordship and the Government of which you are the head, that the experience of every year adds largely to the body of disastrous effects, which show that the speedy amendment of the Act of 1869 has become one of the most urgent necessities of the time, both in the interest of the mercantile class, and for the maintenance of that high tone of commercial morals and honour for which this country has been distinguished. The defects of the present Bankruptcy Law may be shortly stated as follows :—1. It affords new and vicious facilities to insolvent persons to escape from the reasonable control and supervision of their creditors, by private arrangements wholly beyond the jurisdiction of any public court or judge. And by reason of these facilities it is the fact that every year there is an increasing number of cases in which the grievous and dangerous scandal is exhibited of men failing for vast liabilities and finding it easy, in consequence of the defects of the present law, to get their speedy discharge by the payment of no dividend, or a dividend of some small fraction of a pound, or even shilling, and without being subjected to any efficient investigation of their affairs, or of the conduct and proceedings which have led to their insolvency.

That the present law is rendered practically nugatory, by leaving to those who have already incurred losses the investigation of the bankrupt's affairs; and has laid upon them the obligation of exposing the misconduct of bankrupts, which, the plain interests of public morality and commercial policy, should be dealt with not as a private matter, but by a public court and judge. Experience has amply proved that reliance on creditors to perform these onerous and costly functions is entirely futile. The Bankruptcy Act of 1861 did contain in clause 159 provisions for the interference and action of the court in all cases of misconduct on the part of the bankrupt, with a view to his exposure and punishment; but in consequence of the failure of legislation to provide an efficient court and judge, these most salutary provisions were never enforced. 3. That owing to the rapid growth and increasing complexities of modern business, as carried on by private partnerships and joint stock companies, limited and unlimited, English and foreign, it has become perfectly clear that until there is established a Court of Bankruptcy under the presidency of a judge distinguished as a mercantile lawyer, and free to give his whole time and attention to the administration of his court, it is impossible that insolvent debtors can be adequately dealt with by means of public judicial process, and the estates appertaining to them expeditiously and economically distributed. The same remark is applicable to the winding-up of joint-stock companies—a branch of insolvent business of increasing extent, and unfortunately of increasing notoriety for scandals and failures of justice. Your memorialists desire to represent that, in their opinion, great public advantage would arise by the assignment to the efficient court and judge—which they respectfully but earnestly recommend—not only of the insolvency business arising from the failure of private persons and firms, but also arising from the failure of joint-stock companies, as well as from the estates of deceased insolvent debtors. Your memorialists are sensible that your Lordship's Government, represented by the Lord Chancellor and the Attorney-General, and, in the last three Sessions of 1876, 1877, and 1878, present to Parliament Bills for the Amendment of the present Bankruptcy law. These Bills were from various causes prevented from becoming law; and your memorialists now respectfully, but very earnestly, urge upon your Lordship that the Bill of 1878—with such additions as may be necessary to cure effectually the defects set forth in this memorial—be reintroduced at an early period of the coming Session, and that the passage of the Bill be made a leading Government question."

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# THE LAW MAGAZINE AND REVIEW.

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No. CCXXXII.—MAY, 1879.

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## I.—ON THE TREATY-MAKING POWER OF THE CROWN: "LE PARLEMENT BELGE."

A QUESTION of no ordinary interest to Jurists, and of the gravest importance to the Prerogative of the British Crown, has recently been raised in the High Court of Admiralty of England, and has been decided by the learned judge of that Court upon considerations of Municipal Law, in a matter in which it has been hitherto supposed that the *ratio decidendi* was to be sought for exclusively in the cardinal principle of International Law, embodied in the maxim "Pacta sunt Servanda." It is fortunate, on this occasion, that the chair of Lord Stowell is occupied by a Jurist, of whose familiarity with intricate questions of International Law no doubt can be entertained. His decision, however, in the present case, has been influenced, according to his own declaration, by a peculiar interpretation of an Act of Parliament, which does not seem to have ever suggested itself to his learned predecessor, Dr. Lushington, whose respect for Constitutional Law was so profound, that it might be said to have amounted almost to a superstition. Dr. Lushington, nevertheless, on more than one occasion, within the personal experience of the writer, under circumstances of almost identical character with those of the present case, refused to allow process to issue from the Admiralty Court, and summarily disposed of the application in the negative, in deference



to the immunity from civil process of the Belgian mail packets, as Crown vessels. A blot, however, according to the old adage, is not a blot until it has been hit, and the present learned judge of the High Court of Admiralty has observed, in the course of his judgment, as reported very fully in the *Shipping and Mercantile Gazette* of Monday, March 17th, 1879, that the case, as presented to him on argument, was a case *primæ impressionis*, and which was to be decided upon general principles of analogous law, rather than after any direct precedent.

The case, as reported in the above Gazette, was of this nature: The owners of the British steamtug *Daring* had served a writ on board the Belgian steamship *Le Parlement Belge*, under which they claimed the sum of £3,500 for damages arising out of a collision, which had occurred between the steamtug and the steamship, off Dover, on February 14th, 1879. In deference to the writ, an appearance was given on behalf of the Belgian steamship, but the agent who appeared for the steamship seems to have taken no further steps in the matter, and the plaintiff was allowed to proceed by default, according to the practice of the Admiralty Court. In due time, after the usual defaults, the plaintiffs gave notice in the Admiralty Registry that they would apply to the Court for judgment against the steamship, and for a warrant to arrest her. This proceeding would have been in strict accordance with the practice of the Admiralty Court, the suit of the plaintiffs being in the nature of an *actio in rem*, a proceeding unknown to the Common Law of England, but well known to the Civil Law, which is the foundation of the Admiralty procedure. The arrest of the ship would have been followed in due time by its sale under an order of the Court, and by the payment of the plaintiff's damages out of the proceeds of the sale.

Under these circumstances the learned Judge of the Admiralty Court, having satisfied himself by an examination of the papers, that the arrest of the ship and the judgment

prayed might affect the Prerogative of the British Crown (we quote from the same Gazette), and its relations with a foreign State, directed a communication to be made to the proper officer of the Crown, in case the Crown should think fit to direct cause to be shown against the prayer of the plaintiffs. The Attorney-General accordingly appeared on behalf of the Crown, and filed what was called an information and protest, a document of a somewhat anomalous character, but which served the purpose of bringing formally to the judicial cognisance of the Court two capital facts: first, that the Belgian steamship was a public vessel of the Belgian Government, sailing under the pennon of the King of the Belgians, and under the command of an officer of the Royal Belgian Navy holding a commission from the King of the Belgians and in the pay of his Government; and, secondly, that at the time of the collision the said steamship was employed, as a Belgian mail packet, in conveying the public mails from Ostend to Dover, in accordance with the provisions of a Convention concluded between Her Majesty and the King of the Belgians, under which the Belgian mail packets are entitled within British ports to be considered and treated as vessels of war. The document concluded with a protest on behalf of the Attorney-General "that the Admiralty Court had no jurisdiction to entertain the suit, and that the plaintiff could not prosecute the same therein."

The learned Judge of the Admiralty Court, at the commencement of his judgment, expressed his opinion that two questions were raised by the Attorney-General's protest, one being a question of International Law, and the other a question of Constitutional Law; the first resting on the general ground that the steamship was the property of the King of the Belgians and was at the time of the collision under his control and in his employment as reigning Sovereign of the State of Belgium, the other resting on the special ground of a Postal Convention between the two

#### ON THE TREATY-MAKING POWER OF THE CROWN :

ons, under which Her Majesty the Queen had agreed the King of the Belgians to place the Belgian mail-packets in the category of public ships of war. Both of these questions the learned Judge admitted to be questions of great moment, which deserved to be treated separately, though they could not be kept quite distinct, and he proceeded to consider in the first place the general question of the immunity of the Belgian steamship from the jurisdiction of the Admiralty Court, as being the property of the Crown of Belgium, carrying the royal pennon, and manned by commissioned officers of the Royal Belgian Navy. We do not propose to follow the learned Judge through his argument on this part of the case, for our object is not to criticise in a controversial spirit his particular opinion of the case of *Le Parlement Belge*, but to deal from a historical point of view with a great principle involved in the decision, which goes to the root of the jurisdiction of the Admiralty Court, and incidentally involves a breach of good faith towards a friendly Nation. This observation comes to the second part of the learned Judge's argument, which deals with the privilege, secured by Treaty to the owners of mail-packets, of being considered and treated in all foreign ports as vessels of war.

It may be convenient at the outset of our observations to consider the language of the Convention between the Crowns of February 17th, 1876, of which the Sixth Article provides as follows :—

The packets employed for the conveyance of the correspondence between Ostend and Dover shall be steamboats of sufficient power and size for the service, in which they are employed. They shall be vessels belonging to the Government, or freighted by order of the Government. These vessels shall be considered and treated in the port of call, and in all other British ports at which they may incidentally touch, as vessels of war, and be there entitled to all honours and privileges, which the interest and importance of the service in which they are employed demand.

"They shall be exempted in those ports, as well on their entrance as on their departure, from all tonnage, navigation and port dues, excepting, however, the vessels freighted by order of the Government, which must pay such dues in those ports, where they are levied on behalf of corporations, private companies, or private individuals.

"They shall not be diverted from their especial duty—that is to say, the conveyance of the mails—by any authority whatever, or be liable to seizure, detention, embargo, or *arrêt de prince*."

It deserves to be observed, by the way, that this Convention between the two Crowns is stated in the Preamble to be intended to form a sequel to the General Postal Treaty concluded at Berne, in Switzerland, on the 9th of October, 1874. It thus forms indirectly part of a great European arrangement, to which the Crown of Great Britain is a party; and the arrest of the Belgian steam-packet under civil process from the High Court of Admiralty of England, if the Court should decree such a warrant to issue, would not merely involve a breach of faith on the part of the British Crown towards a friendly Government, but would lay the axe to the root of a great International Compact in a manner, which would be *pessimi exempli* to the other States, which are parties to that Compact.

We will now proceed to consider the argument of the learned Judge in its bearings on the provisions of the Postal Convention. "The collision," he said, and we quote as before from the *Shipping and Mercantile Gazette*, "took place on this occasion in Dover harbour, that is, within the body of an English county, and therefore previously to the year 1840 the Admiralty Court would have had no jurisdiction in the matter, but by the joint operation of the Statutes 3 & 4 Vict., ch. 65, and 24 Vict., ch. 10, that Court was given a jurisdiction both *in rem* and *in personam*, in cases where the collision happened in a harbour, as well as upon the open seas. It follows thereupon that the plaintiffs in this suit have a statutable right of action against the *Parlement Belge*, unless that vessel be of that privileged class, which

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not amenable to a Court of Law." The learned Judge proceeded to consider whether the Belgian mail packet was entitled, under the general rule of international comity, to be exempted from the jurisdiction of the Admiralty as a public ship of war, and he decided this question in the negative, having in evidence before him that the Belgian mail packet was habitually employed in conveying passengers and their baggage, and a certain class of goods, between Dover and Ostend. This consideration, however, did not affect any Treaty-right of the Belgian mail packets, seeing that by Article X. of the Postal Convention it was provided as follows :—

"The mail packets shall be at liberty to take on board or to land at Dover, as well as at other British ports where they may be obliged to put in, any passengers, of whatever nation they may be, with their wearing apparel and luggage, and also with horses and carriages, on condition that the captains of the mail packets shall conform to the regulations of the United Kingdom concerning the arrival and departure of travellers. The packets shall be prohibited from conveying goods or merchandise except with the exception, however, of postal packets and parcels, the weight of which shall be limited by mutual agreement between the two offices."

At the present occasion we believe that no question of forfeiture of treaty-privilege was raised against the Belgian mail-packet on the ground of her carrying goods or merchandise in contravention of the Treaty. The decision of the Court proceeded upon pure considerations of Municipal Law, namely, that the Court was bound to exercise its jurisdiction under certain provisions of the Statute of the Realm, and that, as a right of action against the Belgian mail-packet had been given to the plaintiffs by the authority of Parliament, their right, as British subjects, could not be affected by any Treaty between Her Majesty Queen Victoria and the King of the Belgians, unless that Treaty had received the sanction of the British Legislature. So much stress does the learned Judge seem to have laid upon

the circumstance that the plaintiffs on this occasion were British subjects, that we should hesitate to infer that he would hold himself bound to regulate his administration of the Law Maritime, in the case of foreign plaintiffs, by similar considerations of Constitutional Law. Upon the view, however, which we have ventured to form of the beneficial character of the recent Statute Law of the Realm, we should feel constrained to contend that a foreign subject, under analogous circumstances, would be as much entitled as a British subject to the aid of the civil process of the English Admiralty Court against the Belgian mail-packet. The Admiralty jurisdiction is an international jurisdiction in its origin. It is true that the exercise of the process of the Admiralty Court may be controlled by the Municipal Law of the territory, within which it holds its sittings, and it is probable that in no country, where the Admiral has been allowed to set up his tribunal, has his jurisdiction been more jealously restricted by the Statute Law of the Realm, than in England. We do not find, however, in the Statutes cited on this occasion by the learned Judge, anything which applies to the case of a British subject to the exclusion of a foreign subject. They appear to be enabling Statutes of a general character, which have by implication, and in one instance in terms, repealed certain Statutes of the Realm of England, which were passed expressly for the purpose of restraining the Admiralty Court from exercising its jurisdiction, according to the Law Maritime, in any case where a collision between sea-going vessels, of whatever nationality, had happened in tidal waters, if those waters were within the limits of an English county.

It will occur at once to a foreign jurist, who may be conversant with the fact that the High Court of Admiralty of England has been accustomed to exercise its jurisdiction, according to the Law Maritime, over foreign vessels, which have come into collision with British vessels in Chinese or Turkish waters, or in the tidal rivers of Germany and

France—such, for instance, as the Elbe and the Garonne,—to ask himself the question, how, in the case of a collision happening between a British vessel and a foreign vessel in Dover harbour, it can be necessary for the Judge of the High Court of Admiralty to cite an Act of the British Parliament as giving him jurisdiction in such a case, when the proceedings are founded on the same Law Maritime, which is administered by the Court without any authority of an Act of Parliament in the case of a collision happening in the tidal waters of a foreign State? The answer to this question is somewhat far to seek, and it requires for its clear solution an intimate knowledge both of the Statute Law of the Realm of England and of the internecine war long waged between the English Common Law Courts, holding their sittings in Westminster Hall, and the High Court of Admiralty, which was constrained for a long time to hold its sittings on the sea shore, between high-water mark and low-water mark, or upon some quay, washed on either side by the tidal waters of the River Thames, and separated by such waters from the main land. Further, it may almost seem incredible to a foreign jurist that, down to the year 1840, if the Judge of the High Court of Admiralty of England had ventured to permit a warrant of arrest to issue from his Registry against any foreign ship, which had come into collision with a British vessel in the tidal waters of the River Thames, he would have been liable to a prohibition from the Court of King's Bench, and the British subject, who should have presumed to arrest the foreign ship in virtue of such a warrant, would have been liable to an action on the case on the part of the owner of the foreign ship, and would have been mulcted in double damages by the Courts in Westminster Hall. Under restraints of this kind, imposed by the Statute Law, Lord Stowell and Dr. Lushington had their hands fettered from granting any redress to British owners of ships in cases of collision happening within the body of an English county.

It was reserved, however, for Dr. Lushington to live to see the fetters of his Court struck off in such matters, by what may be appropriately designated "the Admiralty Court Emancipation Act." We allude to the 3 & 4 Vict., ch. 65, which the learned judge of the Admiralty Court has cited as one of the Statutes giving him jurisdiction in the case of *Le Parlement Belge*.

This Statute is entitled, "An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England," and after reciting in its preamble, that the jurisdiction of the High Court of Admiralty of England may be advantageously extended and the practice thereof improved, it proceeds to enact, in Section VI., that

"The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damages received by, any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessities supplied, in respect of which any such claim is made."

To render this Act of Parliament perfectly intelligible to a foreign jurist it becomes necessary to review briefly the early history of the High Court of Admiralty of England, which is a Court altogether alien in its origin to the Common Law of England, and of which the procedure is regulated in accordance with a jurisprudence altogether foreign to the law of the land. The jurisdiction of the Admiral's Court in its international character is a jurisdiction of the *jus gentium*, which is vested in the sovereign power of every independent State, whatever be the character of its government, and in whatever department of the State the sovereignty may reside. In the case of England, which is a monarchical State, the Admiralty Jurisdiction is a Prerogative of the Crown, the exercise



of which is of custom committed by Letters Patent of the Crown to a Lord High Admiral,\* who in his turn delegates the exercise of his judicial functions to a Lieutenant. It was in the capacity of Lieutenant of the Lord High Admiral that Dr. Lushington administered the Law Maritime against foreign vessels in matters of contract and tort, happening on the high seas or in the tidal waters of foreign countries, and we believe that we do not err in asserting that the present Judge of the High Court of Admiralty entered upon the duties of his office in the like character of Lieutenant of the Lord High Admiral. It is immaterial for the purposes of our argument, that the office of Lord High Admiral is put into commission at the present time. It has also happened that since the succession of Sir Robert Phillimore to the chair of Dr. Lushington, the High Court of Admiralty has ceased to be an isolated Court, and has been constituted by Statute a member of a system of Courts termed the High Court of Justice ; but this alteration in its municipal relation to the other Courts of Justice, forming that statutory system, has not worked any changes in its jurisdiction over foreign vessels further than as regards its rules of procedure† and matters not organic. Its international right to enforce its jurisdiction against foreign vessels in matters of maritime

\* So necessary, according to the Law of Nations, was the office of Admiral considered to be in the XVIth century in order to give legality to an act of *vis major* on the High Seas, that when the Low Countries revolted against the Spanish Monarchy, and the Prince of Orange granted letters of marque and reprisal to persons disposed to fit out vessels to cruise against Spain, the Spaniards refused to recognise the legality of such letters of marque on the ground that the Prince of Orange had not been nominated Admiral of the Low Provinces. Hence the officers and crews of these cruisers were termed by the Spaniards "Sea-beggars" (*gueux de mer*), and many of them were executed by Spain and other powers on that pretext as pirates

† It has been so laid down in *Chapman v. The Royal Netherlands Steam Navigation Company*, before the Supreme Court of Judicature, March 22, 1879.

contract and of maritime tort rests on a time-honoured practice, which is a tradition either of the Universal Roman Empire before its disruption, or of that Unity of Christendom in matters of Maritime Law, which was brought about by the common necessities of the early Crusaders. Be this as it may, England was amongst the foremost of the States of Europe, which took part in the Crusades, to recognise the advantage of an international concert to maintain the peace and security of the sea, and to punish offenders who should violate the customs of its navigation.

We have discussed in a previous number of this Review the probable origin of the term Admiral.\* The existence of the office of Admiral of England by name may be traced as far back as the reign of Edward I., when we find an entry in the Patent Rolls of 23 Edw. I.:—"Willielmus Leybourne constitutus capitaneus marinariorum, &c. Idem constitutus Admirallus Angliæ." The Records are more complete when we arrive at the reign of Edward III., when we have the famous Roll of 12 Edw. III., "De Superioritate Maris." Further light is thrown upon the subject by the subsequent Close Roll of 35 Edw. III., membrane 38, which contains an order of the King in Council, restraining the King's Commissioners from proceeding in a case of maritime trespass, "*secundum legem et consuetudinem regni nostri*," as they had been previously directed to do, because, as the Roll goes on to say, "upon a recent reference to us and our Council, it appears to be consonant to the said law and custom, that felonies, trespasses, and injuries committed upon the sea should not be referred to and determined by our justiciaries according to the Common Law, but before our Admiral, according to the Law Maritime." Lord Hale refers to this Order in Council as fixing the period, since which the Courts of Common Law in England have ceased to proceed criminally in cases of trespasses committed on the

\* *Law Magazine and Review*, No. CCXXIV., for May, 1877.

igh seas. The issuing of this Order by the King in Council, restraining the action of the Common Law Judges, appears to have encouraged the Deputies of the Lord High Admiral to exercise their delegated jurisdiction in many English ports and havens, over which the Crown had previously granted, by charter, maritime jurisdiction of a limited character either to the Lords of the adjacent coasts or to the corporations of the neighbouring boroughs, and great complaints were raised by the Commons of England against the encroachments of the Admiral on their franchises. These complaints at last led to the passing of the Statute 3 Richard II. (Stat. i., ch. 5), which is of this tenor :—

“ Item : Forasmuch as a great and common clamour and complaint has been oftentimes made before this time and yet is, for that the Admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, encroaching to themselves greater authority than belongeth to their office in prejudice of our Lord the King and the Common Law of the Realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people : It is accorded and assented that the Admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince, King Edward, grandfather of our Lord the King that now is.”

On the other hand, the absolute restraint, which was imposed by this Statute on the Admiral's office, in forbidding him to exercise his jurisdiction in any matter done within the realm, was soon found to be highly inexpedient in criminal matters, and it was determined to remedy the mischief resulting from over-stringent legislation by the subsequent enactment of 15 Richard II., ch. 3.

This Statute was more explicit than the previous Statute in the restraints, which it imposed on the civil jurisdiction of the Admiral ; on the other hand, it excepted from all restraint his jurisdiction over crimes committed within the tidal waters of British rivers. Its provisions are as follows :—

"Item: At the great and grievous complaint of all the Commons, made to our Lord the King in his present Parliament, for that the Admirals and their deputies do encroach to them divers jurisdictions, franchises, and many other profits pertaining to our Lord the King, and to other lords, cities, and boroughs, other than they were wont or ought to have of right, to the great oppression and impoverishment of all the Commons of the land, and hindrance and loss of the King's profits, and of many other lords, cities, and boroughs, throughout the realm: It is declared, ordained, and established, that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognisance, power, nor jurisdiction, but all such manner of contracts, pleas, and quarrels, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, discussed, and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant in any way. Nevertheless of the death of a man and of a mahem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognisance."

We have followed the English translation of the Anglo-Norman text of both the above Statutes, which has been adopted in the Revised edition of the Statutes published "by authority," in 1870. It is remarkable, that both these Statutes have been allowed to remain on the Roll of the Statutes of the Realm, notwithstanding the recent enactment of the Statutes of the Queen, cited by the learned Judge. The significance of this fact has not been overlooked by us, and we propose to discuss it presently in its general bearing on the case of *Le Parlement Belge*.

It was more easy in the reign of Richard II. to legislate than to enforce the laws, but upon the accession of Henry IV. to the throne, Parliament took more effective measures to give effect to the statutory restraints of the Admiral's jurisdiction, by enabling the Common Law Judges to enforce those restraints by penalties against all

persons who should attempt to set them aside. A Statute for this purpose was passed (2 Henry IV., c. xi.), entitled, "A remedy for him who is wrongfully pursued in the Admiralty," which after reciting the enactments of the Statute of 13 Richard II., provided—

"That the said Statute be firmly holden, and kept, and put in due execution, and, moreover, the same our Lord the King, by the advice and assent of the Lords Spiritual and Temporal, and at the prayer of the said Commons hath ordained and established, that as touching a pain to be set upon the Admiral or his Lieutenant, that the Statute and the Common Law be holden against them, and that he that feeleth himself grieved against the form of the said Statute shall have his action upon the case against him that doth so pursue in the Admiral's Court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of ten pounds to the King for the pursuit so made if he be attainted."

This Statute continued to be in force down to 1840, and it is the only one of the three famous Statutes concerning the Admiral's jurisdiction, which has been repealed in express terms by 3 & 4 Vict., c. 65. The other two Statutes remain on the Roll. We speak of these three Statutes as "famous Statutes," for they deserve that name, seeing that they gave rise to a controversy between the Common Law Courts at Westminster and the High Court of Admiralty of England, as famous in its way in the annals of English jurisprudence, as the controversy between Grotius and Selden concerning the Liberty of the Sea is renowned in the annals of the Law of Nations. We do not propose, however, to invite the reader to peruse the list of grievances submitted to Queen Elizabeth by Dr. Dunne, the Judge of the High Court of Admiralty, in 1575, nor to follow the arguments presented by the Common Law Judges to King James I. in answer to the complaints of the Civilians in 1610, nor to examine the Articles of Peace, as we may venture to call them, agreed upon between the Judge of the Admiralty and the Judges of Westminster Hall, and settled by the Council of King

Charles I., in 1632. They are to be found in Coke's "Fourth Institute," and in Prynne's "Animadversions on Sir Edward Coke's Work."

It may be sufficient to remark that the Judges of Westminster Hall in their argument, as submitted to King James I., relied upon the Statutes of 13 Richard II. and 15 Richard II. as declaratory of the jurisdiction of the Court of the Admiral, and as forbidding the Admiral to meddle with any question arising within the body of a county, except as regards the death of a man or a mayhem done in great ships in the main streams of great rivers below the bridges nearest the sea; and the reasons of the Judges are thus stated in their answer to the eighth objection of the Civilians:—

"But for all contracts and pleas and querels made or done upon a river, haven, or creek, within any county of this realm, the Admiral, without question, has no jurisdiction, for then he should hold plea of things done within the body of the county, which are triable by verdict of twelve men, and merely determinable by the Common Law, and not within the Court of the Admiralty according to the Civil Law, for that were to change and alter the laws of the realm in these cases, and make those contracts, pleas, and querels triable by the Common Law of the realm, to be drawn *ad aliud examen*, and to be sentenced by the Judge of the Admiralty according to the Civil Law."

The arguments of the Judges on this occasion were supported by references to other Acts of Parliament, such as 2 Henry IV., c. 11, and 27 Eliz., c. 11; by a long series of judicial precedents, and by the authority of text books; and the result has been described, in the "Fourth Institute" of Lord Coke, in his own sententious language, "*Magna est veritas et prevaluit.*" In other words, Lord Chief Justice Coke carried the day against the Civilians.

The result has been that, from the time of *Violet v. Blague*, (Croke James, p. 514), down to *Velthasen v. Ormsley* (3 Term Reports, p. 315), the Court of King's Bench has unhesitatingly prohibited the Admiralty Court from exercising its

isdiction, *secundum legem maritimam*, in any case of collision, happening between two sea-going vessels, where the collision has happened within the body of an English county, and ever since the last of the two cases above mentioned, which judgment was given by Lord Kenyon, Chief Justice, the Admiralty Court has carefully abstained from exercising its jurisdiction either *in rem* or *in personam* in such case. It was a strange condition of law for British shipowners to rest satisfied with, and it was still more strange that the Judges in Westminster Hall did not vote sooner against being made the statutory instruments impeding the redress of wrong, which in some cases was of a most grievous character. At last another spirit came to the British Parliament, and it was invited successfully to the Queen's Government to modify the restrictions imposed upon the Admiral's jurisdiction in certain classes of cases, and the result has been the enactment of the 3 & 4 Vict., c. 65, which has effected by implication a partial repeal of both the Statutes of Richard II., and in terms a total repeal of 2 Henry IV., ch. 11, so that no penalties would now be incurred by a total disregard of the earlier Statutes. The earlier Statutes, however, remain on record in the Statute Book, and have been printed, as already mentioned, "by authority," in the revised edition of the Statutes (1870). If the view, which the above historical survey suggests, as to the true object of modern Parliamentary legislation on the subject of the Admiral's jurisdiction, be the correct view, the Statute of the Queen (3 & 4 Vict., c. 65) is to be regarded as an enabling Statute, and the explanation of its affirmative language not being in general terms, but condescending to particulars, is to be found in the fact that the Admiral's jurisdiction, *secundum legem maritimam*, is of larger scope than the purview of the Statute, and that the Statute leaves certain ancient restrictions on the Admiral's jurisdiction unrevoked. It was evidently not the intention of Parliament, in amending the law as it stood before 1840, to

authorize the High Court of Admiralty to exercise its traditional jurisdiction to the full extent to which it is warranted by the law of the sea, and to the degree to which such jurisdiction is exercised by the Admiralty Courts of the United States of America.\* A necessity has not been recognised at present in England for so large a measure of change, as would enable the Admiralty Court to hold cognisance of questions of jettison for instance, and to regulate general average by common principles of Maritime Law, instead of leaving it as at present to be settled in each case, according to the custom between mariners and merchants, which happens to be in force in the particular port of the ship's arrival.

We have spoken of the Statute of the Queen as an enabling Statute, and that such a Statute ought to receive a benignant interpretation there can be no doubt. But the Statute is entirely silent as to the law which the Court is to apply in each cause of action, and in the total silence of 3 & 4 Vict., c. 65, on this head, it may be presumed that the Admiralty Court is to exercise its jurisdiction in all cases where the cause of action arises within the body of a county, according to its own principles of law, precisely as it would apply them to cases happening on the high seas. *The Bold Buccleugh* is a remarkable instance in point.† In that case the collision happened in the River Humber, which is within the body of an English county, and the collision was held, after an elaborate argument, to have created a maritime lien on *The Bold Buccleugh*, a Scotch vessel, which, according to the law of the Admiralty Court could not be divested by the subsequent sale of the ship to a *bonâ fide* purchaser for value without notice, and was in fact enforceable against the ship after such sale by a pro-

\* Mr. Justice Story's judgment in the case of *De Lovio v. Bort*, 2 Gallison's Reports, p. 398. See Black Book of the Admiralty. Rolls Edition, Vol. III., p. lxxiv.

† *Harmer v. Bell*, 7 Moore, Privy Council Reports, p. 267.



ceeding *in rem*. Sir John Jervis, Chief Justice of the Common Pleas, who delivered the judgment of the Judicial Committee of the Privy Council, took especial pains in this case to explain the nature of a maritime lien, which he defined to be a kind of privilege or claim against the ship itself, to be carried into effect by a legal process deduced from the Civil Law. The same remark will apply to causes of salvage, inasmuch as salvage services create a maritime lien on the ship to which they are rendered, if at the time when they were so rendered the ship was within the flux and reflux of the tide ; but the maritime lien in the case of salvage differs so far from the maritime lien in the case of collision, that whilst the former is considered to be founded on an implied contract, the measure of which is in the reasonable discretion of the Court, the latter is founded on an evident wrong, the measure of which is the reparation of the damage inflicted by the ship which is in fault, and for which it is liable, according to the Civil Law, to make compensation to the full amount of its value. Under the enabling powers of the 3 & 4 Vict., c. 65, the Admiralty Court, immediately after its enactment, exercised its jurisdiction in all causes of collision within the body of an English county equally as on the high seas, according to its traditional rules ; but in more recent times it has had direct restraints imposed upon it by the Merchant Shipping Acts, which apply equally to both classes of collisions. These restraints affect the valuation of ships for the purpose of assessing damages in cases of collision, and the Statute Law has limited the liability of shipowners in all such cases, whether the vessels are British or foreign, to an aggregate amount not exceeding eight pounds sterling for each ton of the ship's tonnage. This statutory limitation of the liability of shipowners in all suits of collision instituted in the English Admiralty Court has been pronounced, by the Court of Appeal, to be part of the *Lex Fori*, and it deserves note, that as the object of Parliament, on this occasion, was to

restrain the power of the Admiralty Court, the provisions of the Statute Law are couched in prohibitive terms, and are not of the same affirmative character as those of the "Admiralty Court Emancipation Act."

With regard to the imperative character of prohibitory words, where they are used in Acts of Parliament, there can be no dispute; on the other hand, as regards affirmative Statutes, it is sometimes open to the doubt whether their provisions are simply directory, or must be interpreted as mandatory.\* There is, however, an established rule of construction, which applies to affirmative Statutes, when the words are general, namely, that general words and phrases, however wide and comprehensive in their literal sense, must be construed as bearing only on the immediate object of the Act, and not as altering the general policy of the law, unless, of course, no reasonable sense can be applied to them consistently with the intention of preserving that policy untouched. The construction of the 3 & 4 Vict., c. 65, appears to us to fall within this principle, when it authorises, in affirmative language, the Admiralty Court to exercise its jurisdiction in any case of collision or of salvage happening within the limits of an English county equally as on the high seas, and the learned Judge of the Admiralty Court seems to have been of opinion that, in the case of a salvage claim, he could not be called upon by a British subject to allow the process of the Admiralty Court to issue against a foreign vessel, where the exemption of such vessel from arrest and detention was in accordance with the general policy of the Law of Nations. We allude to the case of the United States frigate, *The Constitution*.† In that case a number of British subjects, having succeeded in rescuing *The Constitution* from a situation of some peril

\* Sir John Romilly, in *Minet v. Leaman*, 20 Beavan, 278, cited in Sir Peter Benson Maxwell's Work on "The Interpretation of Statutes," 1875.

† The case of *The Constitution* is reported in Mitchell's "Maritime Register" of January 29th, 1879.

off Ballard's point, on the coast of Dorsetshire, where she had taken the ground on a dangerous shoal, applied to the Admiralty Court for a warrant to arrest the ship of war in a suit for salvage services successfully rendered to her. The learned Judge, however, declined after argument to allow the process of his Court to issue against the ship in this case, it being, as he said, an established principle of the jurisprudence, both of the United States and of Great Britain, that the Admiralty process should not be allowed to issue against a ship of war belonging to a nation with which Great Britain is at peace.

The decision of the learned Judge on this occasion is in perfect accordance with the principle of construction above alluded to as applicable to affirmative Statutes. We should have been disposed to think, had not the learned Judge decided otherwise, that the same principle under which his Court felt itself bound to conform its decision in the case of *The Constitution* to the general policy of the Law of Nations, would have justified it in refusing to allow its process to issue against the Belgian mail-packet, as that vessel is entitled, under the express words of a Public Treaty, duly ratified between the British and Belgian Crowns, to the privilege of a vessel of war within British ports. We even now presume to think that the Court, sitting in this case as an International Court, would have so decided, if it had considered the Belgian Postal Treaty to be fully operative under the circumstances of the case without the sanction of an Act of Parliament. The learned Judge, however, has felt a doubt as regards the constitutional power of the British Crown to make a Treaty, which shall take away from a British subject a right which has been recognized by Act of Parliament, so as to require a Court of Justice to put its provisions into operation without the confirmation of them by the Legislature.

The general power of the British Crown to conclude treaties with foreign States is indisputable, but the learned

Judge, in discussing the unqualified language of Blackstone on this subject, has observed that Blackstone must have known that there was a class of treaties, the provisions of which were inoperative without the confirmation of them by the Legislature, whilst there were others which operate without such confirmation. The language of the Report of his judgment seems to indicate an opinion, on the part of the learned Judge, that wherever a Treaty affects the private rights of British subjects, it requires the sanction of the Legislature. This would be a highly restrictive view of the Treaty-making power of the British Crown, and such as would be hardly reconcilable with the recognized practice of every day. We are disposed, therefore, to think that the Report of the Judge's argument does not do him full justice, and that the learned Judge has in fact rested his decision on the principle, that where a right of a British subject has been recognized by Parliament, the Crown cannot cede or extinguish that right by a Public Treaty without the sanction of the Legislature. This is a very delicate question as regards the constitutional powers of the British Crown, and one which Ulpian would have rejoiced to discuss, whether the Treaty-making power in such cases still appertains to the *merum imperium* of the Crown, or is vested in the *plenum imperium* of the Crown and Parliament.

An analogous question has recently undergone a very full discussion before the Judicial Committee of the Privy Council, in an appeal from a decree of the High Court of Bombay,\* touching the constitutional power of the British Crown to cede territory without the sanction of Parliament. Unfortunately, however, for the purpose of serving as a precedent, which might govern the case of *Le Parlement Belge*, this case is not judicially available, inasmuch as the Court of Appeal found itself in a condition to decide the

\* *Damodhar Ghordan v. Deoram Kangi*, Vol. I., Appeal Cases in Law Reports, 1875-76.

dispute upon a preliminary point, and so avoided a decision upon the great principle, upon which the parties were desirous to have its decision. But the case is valuable on account of the mastery of the subject, which the learned Counsel on either side displayed, and the bearings, which some of the many instances (cited by the Counsel for the appellants) of treaties made by the sole authority of the Crown, have upon the general question, whether the power of the Crown to cede territory by a Treaty without the sanction of Parliament is barred by the circumstance, that the territory in question has been the subject of Parliamentary legislation. In the course of the argument on behalf of the appellants numerous instances of the Crown's having ceded territory by Treaty, without the confirmation of Parliament, were cited, and amongst them four special cases were brought to the notice of the Court, in which the ceded territory had been the subject of Parliamentary legislation previously to its cession. Bencoolen, for instance, on the island of Sumatra, one of the oldest possessions of the British Crown in the East, and originally a Presidency, and named in several Acts of Parliament (13 Geo. III., ch. 53; 42 Geo. III., ch. 29), was ceded to the Dutch in the exercise of the Royal Prerogative alone. St. Pierre and Miquelon, in Newfoundland, which had been the subject of Parliamentary legislation, were given up by treaties in 1763 and 1789 without the authority of Parliament. Again, under the Treaty of 1783, a large part of Canada, which had been legislated for by 14 Geo. III., ch. 83, was given up without the sanction of Parliament, and very recently (1867) territory on the Gold Coast of Africa, which had been dealt with by Act of Parliament (6 & 7 Vict., ch. 13), was ceded to the Netherlands by a Treaty, which has been put into operation without any confirmation by Parliament. The proposition that the Treaty-making power of the Crown to cede territory becomes limited in all cases, where the territory has been the subject of Parliamentary legislation,

would thus appear not to be borne out in practice, and it may be justly said that in all constitutional questions, where the fundamental laws of the State are silent, practice is the best interpreter; in other words, *Optimus interpretæ usus*.

An appeal is stated to have been asserted on behalf of the Crown in the case of *Le Parlement Belge*, and the question, whether the Crown has exceeded its constitutional powers in granting to the Belgian mail-packets within British ports the privilege of vessels of war, will undergo further consideration. The question of the limitation imposed on the Treaty-making power of the British Crown in the matter of a Postal Convention, which is for the common benefit of all Her Majesty's subjects, is *inter apices juris*, which may well deserve to be carried up by appeal to the House of Lords. The learned Judge of the Admiralty Court has, under any circumstances, delivered a well-considered judgment, which will require careful attention on the part of the Appellate Court, to determine whether he has unduly extenuated the Prerogative of the Crown. He was right, in our opinion, to decide in favour of the subject, if he had doubts as to the constitutional power of the Crown to grant to the Belgian mail-packets, by Treaty, an immunity from the civil process of the Admiralty Court. But he was not constrained to adopt that conclusion in the case of *Le Parlement Belge*, by the conviction that otherwise an intolerable wrong would be worked against British subjects, any more than in the case of the United States frigate *The Constitution*. The question involved in the two cases as regards ships of war and vessels entitled by Treaty to the privileges of ships of war is not, whether the States to which they respectively belong shall be altogether exempt from making compensation for salvage services rendered to their ships or for damage done by them to private vessels, but whether their ships shall be liable on such occasions to be arrested and detained by process issued from any

Admiralty Court. The policy of the Civil Law in authorising the arrest and detention of vessels under the proceeding known as an *actio in rem* was founded on two considerations: (1.) That under the Roman Empire ships were for the most part owned by Roman citizens, who did not go to sea themselves in their vessels, but committed them to the charge of their freedmen or slaves, who had no pecuniary means wherewith to make compensation, if they mismanaged the navigation of them, and (2) if the wrong-doers were once allowed to sail away, the security for compensation to those, who had suffered injury from the mismanagement of any vessel, would be lost to them. The convenience of the proceeding *in rem* was equally appreciated in the middle ages, when ships were for the most part owned in shares, and it was impossible for an injured party to seek out the part-owners, and to proceed against them personally, for wrong done by their agents or servants in the management of their vessels. But these considerations do not apply in the present day to the public ships of civilised States, which are in constant communication with one another as members of the family of Nations. There is no fear of any intolerable wrong being worked against the British owners of the steamtug *Daring*, if the process of the Admiralty Court should not be allowed to issue against the Belgian mail-packet, which is the property of the Belgian State. Ever since the case of the *Prins Friederik*, a Dutch ship of war, in Lord Stowell's time (2 Dodson's Admiralty Reports, p. 451) the recognised practice has been, wherever British subjects have suffered damage by a collision with, or have performed salvage services to, a public vessel of a foreign State, for the British Government to transmit officially the claim of the British subjects to the Government of the foreign State, and the question of compensation has been settled by arbitration, *sine strepitu et foro judicii*, the Judge of the High Court of Admiralty of England being for the most part invited to act as arbitrator. Under the Belgian

Postal Convention, the same system of arbitration will be available, and it is evidently for the public interests, that the service of the public mails should not be liable to be interrupted by any unnecessary arrest and detention of the vessels employed in their service.

There is a plain tomb of the greatest of the Plantagenet Kings in Westminster Abbey, on which is engraved the simple inscription: "Edwardus Primus Malleus Scotorum, hic est, 1308. Pactum Serva." We believe the case of *Le Parlement Belge* to be the first instance on record, in which an English Court of Justice has declined to give effect to a duly ratified Treaty between the British Crown and a Foreign Crown on grounds *dehors* the Treaty itself, and it is a singular coincidence that the Court in question should be the Admiral's Court, which owes its institution to the same King Edward I., who speaks to us from the tomb, and exhorts us to observe the Faith of Treaties. The coincidence serves to remind us of the fate of the eagle, which was struck by an arrow poised by a feather, which had dropped from its own wing.

. TRAVERS TWISS.

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## II.—LEGAL FICTIONS: THE CASE OF "ANGUS v. DALTON."

IF the record of the proceedings in our Courts of Justice, which is to be found in the Law Reports, should survive the existing phase of legal ideas, one of the greatest puzzles to a future generation will be to comprehend how the judgments in the recent case of *Angus v. Dalton* (L.R. 4 Q.B. Div. 162), could have been delivered by exceptionally able Judges. To us, who are familiar with the ingenious absurdities handed down by a previous generation, it is less



surprising, and we can only condole with those who exercise their intellectual powers under such manifest disadvantages. That Judges should be compelled to support their conclusions by arguments such as are here put forward, is a misfortune both to themselves and to the public, and I do not quite see where this legal entanglement is to end. Something possibly might be done by a decision of the House of Lords. Very few of the cases which embarrassed the Judges of the Court of Appeal had come before the House of Lords and, perhaps, the present Lord Chancellor might induce his brethren to over-rule them and so to get on to clearer ground. But the House of Lords does not, any more than the inferior Courts, confound the distinction between legislation and judicial decision, and I doubt whether it would be considered to be within its judicial authority to clear away so much rubbish, as would have to be got rid of before the ordinary legal principles applicable to this subject could have free play.

Possibly, therefore, the Legislature will have to interfere, but in the meantime it seems to me that a looker-on may do some good by drawing attention to the unsatisfactory state of the law upon this subject. My only fear is that my motives may be mistaken; and I desire, therefore, to preface what I say with one word of explanation. I am about to criticise, not the Judges or their judgments, but the arguments on which these judgments are based, which I know to be not their own arguments but those which previous decisions have fastened upon them. Nor am I about to base my exposition of the unsoundness of these arguments upon any opinions of my own. I shall rest my observations upon facts and authorities which, anywhere but in an English Court of Justice, would pass undisputed. That is my design; if I err, it is in the execution.

The following was the question to be determined in the case, stated with as much precision as is necessary for my present purpose.

A. and B. had two adjoining houses. A. pulled down *his own* house, and made excavations in *his own* ground. The result of this proceeding was that B.'s house partly fell down also. B. then brought an action against A., alleging that he had a right to the support from A.'s premises, of which he had heretofore had the advantage, and the question was whether he had that right.

B. proved beyond dispute that he had actually enjoyed the support which he claimed for twenty years. Lush, J., thereupon told the Jury that, this being proved, B. was *ipso facto* entitled to the right which he claimed, having gained that right by twenty years enjoyment, just as a man gains a title to land by twenty years possession, and he directed the Jury to find a verdict in B.'s favour.

All the Lords Justices thought this was wrong; they all agreed that the right claimed, if it had not been enjoyed from the time of Richard I. (as in this case it clearly had not), must be based upon prescription or upon grant. But they also went on to say that although B. could produce no grant, and in fact never had one, there were certain circumstances which would put B. precisely in the same legal position as if he had; in which case it ought to be presumed that at one time he had a grant, but could not produce it because it was lost.

Whatever outsiders may think about the matter, we are not entitled to say that there was, in this, anything very wrong or very foolish. Fictions have had a well-established place amongst legal remedies, and though never absolutely the best remedy, have at times been the best remedy available. No student of legal history is much more affected by Bentham's vituperation of fictions than he is by Savigny's praise; he is much more likely to listen to the opinion of Sir Henry Maine, that, though fictions have been useful in their time, the time for them has gone by.

But this by the way. I am not now considering the value of fictions as a class of legal remedies, but the mode in

## LEGAL FICTIONS :

h this particular fiction of a lost grant has been dealt

the grand error which pervades these judgments, and the which must be retrieved before the law can possibly be brought into any reasonable condition, is making the existence or non-existence of this fictitious grant part of the question to be submitted to the Jury. Submit what? The nature of a fiction? The thing on the very face of it is an absurdity. But it is more than an absurdity. It is a monstrous way of treating a juryman's oath to find the truth, and to force him by any device into finding that which is false. One of the Judges in this case lays down that, whilst it is necessary to ask the Jury whether a grant existed or not, the answer must still be told that "mere proof" that it did not exist is not sufficient. Another Judge says: "If the parties at the trial admitted that there was not, in fact, any grant, the answer, in my opinion, was not sufficient to rebut the presumption that there was a grant. The remaining Judge refused to accept this "revolting" doctrine. But by the decision of the majority, which was well supported by previous cases, any English Judge may any day be commanded to say to a Jury, "Gentlemen, the parties to this case have admitted that there was no grant, and it is true that there never was one, but it is your duty, nevertheless, to find that there was." Fortunately, juries do not fully understand the meaning of such a direction as this, or they would assuredly refuse to obey it. The reasoning by which lawyers justify a presumption of that which is false is very subtle. There have been many examples of such false presumptions in our law. Thus, the Judges of the Queen's Bench gave themselves jurisdiction over ordinary civil cases by pretending, untruly, that the defendant had committed a trespass, for which he was in the custody of the Marshal of the Court. Judges of the Exchequer did the same by an equally untrue pretence, that the plaintiff was a debtor to the Crown. So all the Judges

made the action of ejectment applicable to suits concerning real property by pretending, again untruly, that the suit was brought by a lessee of the party really interested. And as a last example, they frequently allowed a wager to be stated and sued on, though no such wager had ever been made or thought of. But Bentham has declared that in his opinion fictions are falsehoods, and that a Judge who invented a fiction ought to be sent to gaol for doing so. What, I should like to know, does an average jurymen think of them? Doubtless he takes the Judge's word for it that it is all right somehow. But must he not at the same time carry away the conviction that his function as a jurymen of finding the truth is not a real one? Whatever a lawyer may do, a jurymen should only be asked to find plain facts. Gaius puts the matter on the right ground. Speaking of one of the fictions of the Roman law, by which a man could be treated as a thief caught in the act, though he had not really been so, and of what was called *legal* as distinguished from actual detection (just as our lawyers sometimes talk of *legal* fraud), Gaius, with obvious truth, as well as good sense, rejects any such fanciful distinction; *neque enim lex facere potest ut qui manifestus fur non sit, manifestus sit; non magis quam qui animo fur non sit, fur sit; at illud sane lex facere potest, ut perinde aliquis pœnâ teneatur atque si furtum admisisset, quamvis nihil admisserit.* That I take to be the true meaning of a fiction. Judges begin to attribute to certain facts consequences, which hitherto were only attributable to other facts. This is all that is really done, and it is in this way, I conceive, that the mendacious aspect of a fiction is got rid of. In this view a fiction has been explained to be a mere artifice of juristical terminology; and so in one sense it is. Whether Judges are right or wrong in having recourse to such an artifice may be questioned, but there is in it nothing mendacious.

Such refined considerations are, however, wholly out of place in the presence of a Jury. Even if they were made

elligible to them their answer would still be, "presume at you like, attribute to circumstances what consequences I please; that is your business; our business, as we have been told by you a hundred times, is to find the truth according to our consciences, and no legal quibbles whatever can absolve us from that duty."

Nor is there the slightest difficulty, as far as I can see, in getting rid of the difficulty which is created by the decisions, in getting rid of the Jury's intervention, so far as it relates to the existence and subsequent loss of the grant. One of the oldest principles of law, and one of the most universal, but which these decisions lose sight of, is *contra verum non admittitur probatio*. For as it is pertinently said: *Quid efficeret probatio veritatis, ubi fictio adversus verum fingit?* Our own Judges in every other instance but this have adhered to the same rule. It is the Court and not the Jury which surmises the existence of a fact, "which is a mistake," as Blackstone says, "the defendant is not at liberty to dispute."—(1 Comm., 43.)

On the other hand, though it is clearly wrong to ask a Jury to find as a fact that a grant had once existed which is well known never to have existed, it does not follow that there is in such cases no question for the Jury at all; and will, I think, help to get rid of a good deal of difficulty, to consider what that question is. Because it seems to me that the opinion which prevailed in *Angus v. Dalton* was given under a wrong impression as to what other course it was open to adopt. It might be reasonably feared that to ask the Jury whether there had been a grant, just as they might be asked any other question, would defeat the whole object, as the Jury would certainly, if left to themselves, find the truth. So again, to hold that payment of the right as owner thereof in itself gave a title, is a course for which the previous decisions give no sanction, and which is, moreover, in the case of negative decisions at any rate, manifestly unjust. And so the

Judges apparently deem it necessary, as the only other alternative, to ask the Jury whether there was a grant, with directions that under such and such a set of circumstances they were bound to find that it had existed, whether they believed it or not. The Judges obviously think, and it is very reasonable that they should think, that under certain circumstances the right ought, and that under other circumstances it ought not to be acquired by enjoyment. But it does not seem to have occurred to them that it is perfectly easy to regulate the acquisition of the right in any way you please, without putting any pressure upon the conscience of the Jury. The Judges have only to settle—what it is obviously their province to settle—the circumstances under which the right may be gained, and to work the fiction accordingly. They may say, if so minded, that in order to give the claimant the benefit of the fiction the enjoyment must have been apparent, and that it must not have been obtained by violence or fraud; they may say that the claimant will not have the benefit of the fiction, if the servient owner has been during the time of enjoyment insane; they may say that he will have it, notwithstanding that the servient owner has all along protested against the enjoyment, but not if the protest has been followed by interruption. And of course it would be for the Judges in each case to ask the Jury, and for the Jury to determine what in fact were the circumstances under which the right claimed had been enjoyed. Even if the Jury could in law refuse to answer these inquiries, there is practically no likelihood that they would do so, nor under the present rules of pleading can I imagine that there would be any real difficulty in placing these questions before the Jury for their consideration. If there is any difficulty it ought to be removed.

The first and most essential step, therefore, is to get rid of this tampering with the conscience of the Jury, but before the law upon this subject can be placed upon a

satisfactory footing, another notion which pervades one of the judgments in this case must also be got rid of, and that is that all acquisition of easements by enjoyment rests upon the presumed assent of the servient owner. It is hard to know how to attack a fallacy so baseless, or to refute a proposition which, the moment it is examined, melts away into nothing. Does it mean a real assent, and that the assent in that case confers the right? It is sufficient to dispose of this suggestion to answer that a real assent hardly ever exists, and that even if it did it is clear law that it would not confer the right, which can only be created *inter partes* by an instrument under seal. Does it mean a fictitious assent? Then the proposition comes to this, that the law is bound irrevocably to a fiction, which, besides being absurd in itself, is contradicted by the fact that out of England innumerable easements have been acquired without resorting to any presumption of a fictitious assent whatsoever.

Akin to this is the error about acquiescence. Following out the erroneous notion that in prescription there is always a presumption of assent, English Judges have asserted that an easement cannot be gained unless the enjoyment has been acquiesced in by the servient owner. More than once it was said in the course of this case that a man who does not know that his own premises lend support to those of his neighbour cannot be said to acquiesce in their doing so, and, as a sequence from this, it is observed that where the enjoyment is secret it cannot be gained. This view of the law is generally based upon the expression "clam" of the Roman lawyers, but the meaning of this expression has been misconceived. To do a thing "clam" in the Roman Law was to do it without notice to the person who, the doer had or might have had reason to suppose, would object to its being done; *clam facere videtur qui celavit adversarium neque ei denuntiavit, si modo timuit ejus controversiam, aut debuit timere*. This was looked upon as

a dishonest mode of acquiring possession, and *for that reason* resulted in no benefit to the party. It is rectitude of conduct on the part of the dominant owner, and not knowledge on the part of the servient owner, which the Roman Law required. The opinion to the contrary founded on a single passage of the Code has been shown by Savigny (Syst IV., 494) to be erroneous, and it is now, I believe, fully agreed (see Vangerow, Pand, s. 351) that the *scientia domini* was not a requisite to the acquisition of easements by prescription under the Roman Law.

Strange to say, whilst insisting vehemently upon the necessity of presumed assent or acquiescence on the part of the servient owner, English Judges almost in the same breath declare that it is of no avail to prove that there was no assent at all on his part, nor even that he actually dissented. What, as Lord Justice Bramwell once asked in a similar case, must any man who is not an English lawyer think of such a contradiction as this? No explanation but one is possible, namely, that the Judges are seeking for the right thing under the wrong name. They go on to say that dissent followed by interruption prevents the acquisition. Then why in the world not say, in plain and intelligible language, that what prevents acquisition is not the absence of assent or the dissent of the servient owner, but the interruption itself; and for the plainest of all possible reasons. Not because interruption negatives acquiescence, or because the absence of interruption leads to a presumption of assent. If this were the true ground, it would be merely arbitrary to give to an actual interruption an effect which was not given, say, to a distinct written notice; and we should be guilty of the absurdity of giving to a fictitious assent an effect which is not given to a real one. The true ground why interruption prevents acquisition is a far stronger one, namely, that continuous enjoyment being the very ground and basis of the acquisition, the acquisition is as completely stopped by interruption of the enjoyment as



if a man were interrupted in signing a deed by which his property was to be conveyed.

Another error of language, less mischievous, but still one which it is desirable to remove, is the assertion that the right to the support of your own house by your neighbour's premises is not a right of property. It is difficult to conceive what definition could be given of rights of property which would exclude such a right as this. The right of support, if it exists at all, is, to use the expressive language of the Roman Law, a *jus in re alienâ*, and it is also a *jus in rem*; or, combining the two phrases into one, it is a right over a thing available against all the world. Is not every such right a right of property? I think everyone would say so who was not blindfolded by the English cases. The Judges, who use this language, do not say what in their view constitutes a right of property; but whilst they admit that the support of land unencumbered by buildings is a right of property, they say that a similar right if the land be built upon is not. The ground for this distinction seems to be the notion that the former right existed from the "beginning," an expression which, as I understand it, is not equivalent to "time immemorial," or the commencement of the reign of Richard I., but throws us back to the date of the last great geological change. I gather also from one of the judgments that Lord Wensleydale applied another test to rights of this kind, "that they were bestowed by Providence for the common benefit of man." To my mind this is a sorry mode of eking out a legal argument. Supposing it to be correct to assert that Providence did bestow the right of support of unencumbered land for the common benefit of man, how does that prove that the right of support in this case is a right of property, and that in the case of encumbered land it is not? This is another instance of confusion in the use of language. What is really meant is this: that the right to support is, in the case of unencumbered land, attributed by the law without

any proof of its acquisition; whereas, the right to support of encumbered land is not attributed by the law, but must be shown to have been acquired. That is what is meant, and so stated the assertion is intelligible. This is the phraseology in similar cases of both the French and Italian Codes.

There is, however, one difficulty connected with this subject which I am bound to admit that mere verbal correction will not altogether remove. The Lord Chief Justice Cockburn, in his judgment in the Court below (L.R. 3 Q.B.Div. 85), insisted very strongly that if the right was one which practically could not be obstructed, it could not be acquired by enjoyment, for the reason that the most vigilant owner would thus be exposed to have his rights curtailed at the will of his neighbours. The Lord Chief Justice also considered that obstruction of the enjoyment of the right of support, when the dominant owner had exceeded, what I may call for want of a better expression, the natural right, was practically impossible. That is to say, he considered it practically impossible for a man to dig away his own soil so as to take away the support from his neighbour's house, as soon as his neighbour began to lean too much upon him. Most people, I imagine, will agree with the Lord Chief Justice. But supposing we do not go so far. Why on earth should people be driven into doing anything so selfish and unneighbourly? No one wants to do anything of the kind, and a rule of law which brought about any such result would be most disastrous. Everyone has probably seen in various parts of the suburbs of London half-a-dozen boards nailed to the top of two poles, and placed so near a neighbouring window as to exclude all light from entering it. This melancholy object might serve as a monument to the author of the Prescription Act, to whom we are indebted for it. The ground which is overlooked is generally occupied by cab-bages, sometimes it is not occupied at all, and only lies

waiting for a builder to take it. No one's privacy, or convenience, or comfort would be interfered with by the window in question, if the view from it were wholly unobstructed, and a gloomy chamber would, for a time at least, be rendered more cheerful. But no prudent owner dare allow this. Parliament has decreed, that if this window remains unobstructed for twenty years, a considerable strip of the adjoining ground shall become for ever useless to the owner; that is to say, it cannot be applied to the only purpose for which it is really suitable, namely, for being built on.

Savigny, by no means an impulsive lawyer, calls such a state of things monstrous, and not being embarrassed by the Prescription Act, proceeds to examine whether upon true principles of law a negative easement is gained merely because the adjoining owner has not interrupted its enjoyment. The argument is well known, and I need not repeat it here. He comes to the conclusion that the right is not gained.

It is not necessary for me to say whether Savigny's conclusion is right or wrong. English Judges seem to be divided upon the point, some thinking that negative easements can be so gained, and others that they cannot; others again thinking that some negative easements can be so gained, but not all. As regards light the question has been settled in England by statute in favour of the acquisition, whilst by the two codes which I have already had occasion to refer to the question is settled the other way. I do not think a solution of this question in the sense of the Prescription Act can be considered a satisfactory one. Even if Savigny be wrong in his law, there is at least good sense in his observation that a man ought not, merely by building a house, to put himself in the way of gaining numberless easements against all his surrounding neighbours, who (I assert again), are practically powerless to prevent the acquisition. Fancy what would happen if in a crowded

town, when a man added a new storey to his house, his neighbours began to "interrupt" his enjoyment of the various easements incident to such a building. They would have to treat him as bees are said to treat an intruder into their hives—they would have to enclose him in a kind of shell or cylinder impervious to the light, at the same time digging a trench all round his foundations. Indeed, I am not sure that, in theory, this trench ought not to be dug so as just to let down the new building. Anyhow it is an operation requiring the nicest mechanical calculations, and probably rendering it necessary to pull down and rebuild many of the adjoining houses. If this is practicable, I still ask, is it desirable?

But I admit that the rigid application of the other alternative, namely, that even an enjoyment from time immemorial will not confer the right to a negative easement, would scarcely seem to be acceptable to English people. Sometimes it happens that a small house, which has been comfortably lighted and ventilated for perhaps a hundred years, is about to be rendered almost unfit for habitation by a huge building planted at its side. I am afraid that no arguments which Savigny or any other lawyer could produce would persuade English people that there was in this no injury which the law ought to redress; and if people think that this ought to be the law, they have a right to make it so. But no power on earth can make the acquisition of negative easements conform to the principles of acquisition founded upon user. The easements of light, and air, and of support, if not created by a real agreement, express or implied, ought, to the extent desired, to be attributed by the law, and rendered entirely independent of acquisition by enjoyment. Acquisition by enjoyment in cases where enjoyment cannot be interrupted is a far less satisfactory expedient, and not a whit more just, than giving to all men, without enjoyment, a fixed and modified right to certain easements which everybody

requires, and by which, if a man loses in one direction, he gains in another. The extent to which such easements will be attributed by the law, and the manner in which they will be secured, should be laid down in a code of building regulations, which will naturally be more minute than, and in some respects different from, those of the French Code, but for which the clear and simple provisions of that code will form something like a model. Moreover, it serves no useful purpose to go back for the origin of such rights to "the beginning," or to derive them from the "bounty of Providence." Nor is it necessary to have recourse to any of the principles handed down to us by the Roman Law. These principles are not in all respects suitable to the wants of the nineteenth century. The legislative authority of Parliament is strong enough to establish such rights on a firm basis. Judges have done their best to put the law on a reasonable footing and have failed. A good Parliamentary Committee, well advised by persons of skill and experience, could, I believe, easily settle the matter.

W. MARKBY.

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### III.—ON THE SIMPLIFICATION OF THE MARRIAGE LAWS OF THE UNITED KINGDOM.

**I**N a recent article in this Review\* we touched upon the subject of Marriage, and we recur to some different aspects of it in the present number. The latter part of our former essay was principally devoted to the question whether in English law the contract of marriage was civil or religious. We endeavoured to show that though the Church claimed to hold this contract in her holy keeping,

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and the State largely acknowledged the soundness of her claims, yet the latter strongly asserted it to be within its own proper province; and that, primarily, matrimony was a civil contract, and a civil status, into which the persons marrying entered. The social results of marriage—the position of the spouses to each other, and to the rest of the world—their liability to the criminal law by endeavouring to contract a second tie while the first yet subsists—and their mutual derivation of the rights of property, would warrant this claim of the State. The whole law of succession to property, as well as the position of the offspring, depends upon the union being marriage and lawful, or promiscuous and unrecognized. From whatever point of view we may regard it, marriage must always be important and interesting; and a very, if not quite the most, important point is, that the contract should be as public as possible. The entry into such an engagement and undertaking ought to be fenced in with safeguards against fraud, secrecy, or clandestinity. “It is the duty of the State to discourage and place obstacles in the way of sudden and clandestine marriages, both for the sake of inducing forethought and deliberation generally in the formation of indissoluble relations upon which the happiness, usefulness, and morality of life depend, and also for the special purposes of preventing incest and polygamy, and enabling parents and guardians to protect minors from improvident and unsuitable connexions.”\* We may take a hint on this point from recent legislation. After the passing of the Irish Church Act, and by 33 & 34 Vict., c. 110, the heads of certain denominational bodies in Ireland were granted the privilege of issuing special licences, to marry anywhere and at any time within three months, to persons who were both of the same persuasion as the head or chief of the sect; but in the following year, by 34 & 35 Vict., c. 49, this privilege

\* “Report of the Royal Commission on the Marriage Laws,” p. xxv.

was fenced in by the proviso that such licence should be preceded by a Registrar's certificate. Do the marriage laws of the United Kingdom really conduce to proper publicity and security? We think that, individually, they fall very far short of these desiderata; but harmoniously blended, they would, to a considerable extent, ensure these needful objects. The three kingdoms, England, Scotland, and Ireland, though politically forming a whole, are in many ways widely different from each other; the laws and customs found on one side of the border not only have vanished as you step across, but their very opposites and contradictories take their place. The task of assimilating the laws of the three countries, preserving the good of each, casting away the worthless, and supplying what is wanting, would be one that a legal or philosophical Herakles himself might well decline. The laws which deal with the formation of the marriage contract afford a striking example of this diversity. That course of conduct which in one country is evidence of marriage, and goes to prove a contract, is in another utterly powerless to impress upon a connexion, however vital it may be to the interests of many, the stamp of a valid marriage, if the intention of the parties is that their connexion should not be marriage. The law of the land here in England secures a greater amount of publicity in more instances both before and at the time of the marriage ceremony than that of Scotland or Ireland, certainly than that of Scotland, as we shall shortly see. In Ireland the law that governs the marriages of Roman Catholics is different from that which regulates the union of those of other denominations, and is the common law of the country in such matters; and as the marriages under it form a large majority of all that take place, in treating of our present subject we must regard it as the law prevailing in the country. The evil of this diversity of laws has been an ever present one, and from time to time attempts to grapple with it have been made; but like all reforms which

most nearly and dearly concern the good estate and happiness of the people, they have been for a time unsuccessful, and the matter has been shelved to a more convenient season. Legislation on marriage has been of the usual piece-meal and patchwork order—correcting from time to time flagrant abuses in England, then in a few years trying to assimilate the law of Ireland, with every now and then at lengthy intervals a tinkering up of the Scots law ; harking back to dig up a fresh crop of scandals that flourished in England ; then after an appropriate lapse of time weeding the Irish garden ; and winding up with a feeble attempt to make the Scotchman's field something like that of the other two countries. A good sound judicious and universal piece of law-making was more than was to be expected ; and, we are afraid, is not yet to be realized ; but hope still remains.

In 1865, a Royal Commission, presided over by the late Lord Chelmsford, was appointed "to inquire into and report upon the state and operation of the various laws now in force in the different parts of the United Kingdom with respect to the constitution and proof of the contract of marriage, and the registration and other means of preserving evidence thereof." The Commission finally made their Report in July, 1868, and it is to this Report that we are largely indebted for much information and many useful suggestions in the following article. We shall not concern ourselves about the registration of marriages, because that is a matter that is only the effect of a cause, and happens after the event, and does not fully secure publicity or check fraud and improvidence in the inception of the tie. We shall treat only of the preliminaries of marriage which may best secure regularity and publicity of the fact. We shall not touch upon such questions as the capacity or ages of the contracting parties ; nor will divorce come within the scope of our suggestions. In a word, to sum up the gist of our remarks—before whom, as an official witness, shall the



consent of the parties to become man and wife be declared? We propose to divide our subject under the following heads :—

I. A statement of the marriage laws of the three kingdoms.

II. Desirableness of uniformity of laws, and of making a civil ceremony compulsory.

III. Criticisms on certain objections which may be offered to such a proposal.

IV. A sketch of the proposed plan to ensure proper publicity and notification of the fact of marriage.

I. We will first set out the laws of England which deal with the preliminaries of marriage, then those of Ireland, and lastly those of Scotland.

### *Marriage Laws of England.*

I. Marriages according to the Rites and Ceremonies of the Established Church.

(i.) *By Publication of Banns under 4 Geo. IV., c. 76.*—Banns must be published in an audible manner, on three consecutive Sundays preceding the marriage, in the parish church or public chapel of the parish or chapelry, in which they may lawfully be published [or of each parish or chapelry, if more than one], in which the persons intending to marry shall reside, who must be named in such church or chapel [or one of such churches or chapels], except their proper church or chapel is rebuilding or under repair. Before publishing banns the clergy can, but very seldom do, require seven days previous notice of the names and residence of the persons to be married. Such publication of banns is absolutely void if the clergyman publishing them has notice of dissent at the time of publication from those entitled to dissent ; or, if the marriage is not solemnized within three months of last publication ; or, if the marriage is without good reason not solemnized in the

proper church or chapel. Publication of banns can lawfully take place only in parish churches, and in other churches or chapels specially authorized by episcopal licence, or Order in Council.

(ii.) *By Special Licence.*—This is granted by the Archbishop of Canterbury alone under 25 Hen. VIII., c. 21, sec. 4. Its price is prohibitive; and it is a luxury in which only the wealthy can indulge; and but very few are issued in the course of the year. It is granted only on special grounds; its privileges are that the marriage can take place at any time and any place within three months of its issue.

(iii.) *By Common Licence.*—This is granted by the Archbishops through their vicars-general for their respective provinces, and by the Bishops through their Chancellors and surrogates, for their dioceses, under 4 Geo. IV., c. 76. One of the persons wishing to be married by such licence must appear in person before the surrogate, and state upon oath:—(a.) That he or she has, for the preceding *fifteen* days, had his or her usual place of abode within the parish or district in the church or chapel of which the marriage is to take place. (b.) That he or she does not know of any impediment of kindred or alliance, or any other lawful cause why the marriage should not be. (c.) That the consent of the proper persons has been obtained. [This last is required where either party is a minor, and has not been previously married.]

A marriage upon a licence must take place in a church or chapel named in the licence within three months from the date of its grant. A caveat may be lodged against such licence, in which case it must not be issued until the judge, out of whose office the licence is to issue, certifies to the Registrar that such licence ought to issue, or the caveat is withdrawn.

(iv.) *On Production of the Registrar's Certificate, under 6 & 7 Will. IV., c. 85, and 19 & 20 Vict., c. 119.*—This certificate

is in lieu of the publication of banns, and the clergy may, but are not bound, to marry persons under it. The forms to be observed we will set out later on, under the head of the Registrar's Certificate.

Marriages under any of the foregoing, except the special licence as to hours, must be solemnized between the hours of 8 a.m. and 12 noon, in the presence of at least two witnesses, besides the officiating clergyman.

2. Marriages not according to the Rites and Ceremonies of the Established Church.

Although by the Toleration Act of 1 Will. and Mary, the status of Dissenters was recognised, and their marriages, celebrated according to their own rites and usages, were treated as marriages *de facto*, yet Lord Hardwicke's Act made the Church of England the sole medium of contracting legal marriage. The Marriage Act of 1823 [4 Geo. IV., c. 76] in no way altered the law in that respect; and it is not until we come to Lord Russell's Act of 1837 [6 & 7 Will. IV., c. 85] that the hardship of compelling persons of one religious persuasion to frequent the sacred edifices of those of another, in order to be married, is removed. The scope of the Act was to enable dissenters to celebrate their marriages according to their own rites in their own places of worship, if so registered, and in the presence of a Registrar of Marriages. It also enabled those to be married who did not care to employ a religious ceremony; also those who, being of different creeds, thought the civil rite should be added to the religious.

Such marriages may take place—(a.) on the Registrar's certificate, or (b.) on his licence.

(a.) *On the Certificate.*—One of the parties desiring to marry must give notice in writing to the Superintendent Registrar of the district in which they must have lived at least the *seven* preceding days [and if they live in more than one district, then to the Superintendent Registrar of each

district], and must also state their names, surnames, and profession or condition ; how long they have lived in the district [or districts], and the building in which the marriage is to take place. He or she must also make a declaration that there is no impediment of kindred or alliance, or other lawful hindrance to the marriage ; and that the consent of the proper persons [if both or either of the contracting parties are or is under age, and not previously married] has been obtained. Such notice is to be entered in the "Marriage Notice Book," which is to be open at all reasonable times for inspection. An exact copy of this notice must be suspended in some conspicuous place in the office of the Superintendent Registrar during 21 consecutive days after the entry of the notice in the book. The issue of this certificate may be forbidden at any time before it is issued ; and if so forbidden, all proceedings based on it become void. At the end of the 21 days, and if no objection to the projected marriage has meanwhile been offered, the Superintendent Registrar issues his certificate. The parties can now marry at any registered building, according to the rites and usages of their communion ; provided that they are married within the hours of 8 a.m. and 12 noon, *and in the presence of a marriage Registrar* ; or at the Registrar's office between the same hours, and in the presence of the Superintendent Registrar, and one of the marriage Registrars of the district, and two witnesses.

(b.) *On the Registrar's Licence.*—The same sort of notice must be given to the Superintendent Registrar ; but there must be a statement that both or either of the parties have or has had their or his or her usual place of abode for at least the *fifteen* preceding days within the district. The other declarations are the same as under the certificate. This notice need not be suspended in the office. The certificate of the notice, unless forbidden, may be given after the expiration of one whole day next after the day of

entry of such notice, and the marriage may be thereupon solemnized at any registered building mentioned in the licence.\*

Certain exceptions to the above provisions are made in favour of Quakers and Jews. The members of these bodies require, like other Nonconformists, the Registrar's certificate or licence; but they are not restricted to registered buildings, or to buildings within the district or districts in which the parties dwell. Any place within the Superintendent Registrar's district in which marriages can properly be solemnized, according to the usages of these denominations, may be inserted in the licence or certificate. Neither Jews nor Quakers require the presence, at their marriages, of the Registrar. In the case of the Quakers, the presence of an officer, called the "registering officer," and in that of the Jews, of the certified "secretary of a synagogue," dispenses with that of the Registrar.

A marriage contract may be vitiated and rendered null in law by the falsification or even slight disguise, through the fraud of both parties, of a Christian name or surname in the publication of banns, and possibly in a Registrar's certificate, but not in a common licence. Instead of nullity for such fraud in a licence, it is now forfeiture of all property accruing from the marriage.

#### *Marriage Laws of Ireland.*

Since the beginning of the year 1871, great changes have taken place in Ireland in the relative position of the religious bodies. Before that date there was an Established Church; now there is no church or communion more

\* No licence can be granted for a marriage in any church or chapel belonging to the Church of England, or licensed for the celebration of divine service according to its rites. Nor can a certificate be issued for a marriage in a registered building which is more than two miles out of the Superintendent Registrar's district, except for the reasons specified in 3 & 4 Vict., c. 72, secs. 2 & 5.

particularly favoured than another, but all the more important denominations are placed on the same level in the eye of the law.

We propose to treat the Irish law of marriage on the denominational basis, and to notice only those points which do not appear in the English system; for the two systems as created by statute are substantially the same.

1. Marriages according to the Rites of the Episcopalian Church.

(i.) *By publication of Banns, under 33 & 34 Vict., c. 110.*—Banns may be published on any holy day, as well as Sunday. The clergy have not the power of making certain inquiries before publishing banns, which in England they are entitled to do. The ceremony must be performed within the hours of 8 a.m. and 2 p.m.

(ii.) *By Special Licence.*—Under 33 & 34 Vict., c. 110, s. 36, where any persons are both of them Protestant Episcopalians, and desire to marry, any bishop of the Episcopal Church may grant them a special licence to marry, at any convenient time, in any place within his episcopal superintendence. The parties must now, under 34 & 35 Vict., c. 49, s. 22, before the marriage, produce a Registrar's certificate, which must be signed by the contracting parties, at least two witnesses, and the officiating clergyman.

(iii.) *By Common Licence.\**—This licence is issued by persons nominated by the bishops, under 33 & 34 Vict., c. 49, s. 35,† and authorizes marriage in the churches or chapels within the districts for which the surrogates are appointed. These persons so appointed must, before acting, give security by bond for £100 to the Registrar-General, for the

\* The cost of this licence being cheaper than that of the publication of banns, the majority of Episcopalian marriages is by licence rather than banns.

† This statute legalizes "mixed marriages," i.e., marriages between persons of different denominations; and exempts from punishment Episcopalian and Roman Catholic ministers for celebrating such marriages in accordance with the provisions of the Act.

proper performance of their duty. A licence is granted, after the expiration of a *seven* days' notice, to the party applying for it, who has resided not less than *seven* consecutive days in the district of the licencer previous to the application for such licence. Before it is granted, such party must on oath declare that he or she has resided *fourteen* days in the district. The licencer is bound to send a copy of the notice as received by him, and entered in his book, to the incumbent of the parish [or of each of the parishes, if more than one] in which the parties reside.

(iv.) *On the Registrar's Certificate.*—The clergyman is bound to marry the parties on the production of a proper certificate.

## 2. Roman Catholic Marriages.

Between the laws affecting these marriages and those ordinarily prevailing in England there is a wide divergence, which is due to more modern legislation on marriage in England than in Ireland anterior to the passing of the Irish Church Act. The common law in Ireland in matters matrimonial is considered to be the decrees of the Council of Trent, which have been and are accepted as binding, save where they have been altered or over-ridden by legislative enactments.

(i.) *Publication of Banns.*—By the law of the Church, banns ought to be published on three consecutive Sundays or holy days, but are usually dispensed with by episcopal licence.

(ii.) *Necessity for the Intervention of an Ordained Minister.*—By the common law marriage must be solemnized by a clergyman in holy orders;\* and a marriage solemnized by any such clergyman in a church, or private house, at any time and anywhere, between persons competent to marry,

\* This applied equally to a clergyman of the United Church of England and Ireland; but see the case in Scotland, where the decrees of the Tridentine Council do not obtain, *Folly v. MacGregor*, 3 Wil. and Shaw 85, which goes to the opposite contention.

was and is valid without banns, licence, residence, or consent.\*

(iii.) *Special Licence*.—The same *mutatis mutandis* as the special licence granted by the bishops of the Protestant Episcopal Church.

### 3. Presbyterian Marriages.

These marriages are regulated by 7 & 8 Vict., c. 81, passed to counteract the effect of the decision of the House of Lords in the *Queen v. Millis* (10 Cl. and Fin. 534). The rules governing them are analogous to those of the late Established Church in like matters. They may be celebrated by a Presbyterian minister in a certified Presbyterian meeting-house, between two Presbyterians, or one Presbyterian and another of a different denomination.

(i.) *Publication of Banns*.—These must be published on three consecutive Sundays in the certified meeting-house [or in each of such, if more than one] frequented by the congregation [or congregations] of which the parties are members.

(ii.) *Notice*.—A six days' notice in writing must be delivered to the minister of the parties' true Christian and surnames, of the congregation or congregations to which they belong, of their respective abodes, and the time which they have dwelt in them.

(iii.) *Licences Granted by Ministers appointed to issue such*.—If both parties desiring to marry are Presbyterians, they have choice of banns or licence; if one only, the latter is necessary. The preliminaries for the application of this licence are similar for the most part to those needed in a like application in England. But the person applying for this licence must, seven days before it is issued, produce to the licensing minister a certificate from the minister of the congregation of which he or she shall have been a member

\* This is contrary to the discipline of the Roman Church, but as it is not contrary to the law of the land as affecting Roman Catholic marriages, a marriage so celebrated is valid.



for at least one month previously, stating that he or she has duly entered a notice of the intended marriage in a book kept for the purpose in that congregation; and that he or she is a member of that congregation, and knows of no lawful impediments, &c., &c. It does not appear that any period is fixed within which a marriage either upon the publication of banns or a licence must take place.

(iv.) *Special Licence*.—This is issued by the heads of the different Presbyterian bodies, and is identical with those granted by the bishops of the Episcopal Church.

4. Marriages of Quakers and Jews.

The rites and usages of these religious societies are preserved to them as in England.

5. Marriages on the Registrar's Certificate or Licence.

(a.) No exhibition of the notice is required to be suspended in the Superintendent Registrar's office, unless the marriage is to take place in it.

(b.) The presence of the Registrar is now dispensed with when the marriage is celebrated at the place mentioned in the certificate or licence, and not in his office.

(c.) When the marriage does not take place in his office, the Superintendent Registrar must send to the person officiating as minister at the church, chapel, or place of public worship which the parties or either of them usually attend, a copy of the notice signed by him.

(d.) When the marriage takes place in the Registrar's office, he is to publish, at the expense of the parties, once at least in two consecutive weeks next after he has received the notice, a copy of such notice in some newspaper circulating either in the district or county in which they reside.

Although the law of Ireland on such matters as the marriage of minors, consent of guardians, caveats, and prohibitions is substantially the same as that of England, yet it does not touch the marriages of Roman Catholics, who are *legibus soluti* in such things; and as such marriages form a large

majority, the mischief of which we complain is widely spread throughout the country, though the Roman Catholic authorities are diligent in promoting proper and in discouraging irregular marriages, and in procuring all necessary publicity by registering the same.

*Marriage Laws of Scotland.*

When we come to treat of some of these laws we find that we are as it were in a quite different atmosphere. The rules governing the marriage contract date back to times anterior to the Council of Trent. The decrees of this Council, though accepted by and now prevailing in most Roman Catholic countries in which the Canon law obtained, were never received and acted upon in Scotland; where, by the laws of other countries, witnesses are strictly required to constitute a valid marriage contract, by those of Scotland they are not indispensable. Mere consent of the parties to become husband and wife is enough; and in some cases it has been held that the consent of both is not a necessity. The danger most to be apprehended arises from the terrible uncertainty of the married state.

There are two kinds of marriages by Scots law: (i.) Regular; (ii.) Irregular.

(i.) *Regular Marriages*.—(a.) *On the Publication of Banns*: These marriages are such as are solemnized by ministers of religion, whether those of the Established Church or not. The banns of the parties must be published in the Church [*i.e.*, the Established Church] of the parish\* in which each of the parties resides, whether either or both belong to the Established Church, or to any other denomination. Application for publication must be made to the session clerk, accompanied by a statement verified by the certificate of two householders or one elder of the parish that the parties, or one of them, have or has resided for *six weeks* in the

\* Whether original or *quoad sacra*, *Hutton v. Harper*, 1 App. Cas. 464.

parish; that they are unmarried, and not within the prohibited degrees. The publication should be made when the congregation is assembled for divine service; but as a rule banns are cried before the assembling of the congregation; and generally, by the payment of larger fees, three times, one after the other, on the same Sunday, though they ought properly to be published on three consecutive Sundays. For such marriages there is not any particular form or ceremony, or any particular time or place. The only thing needful is the presence of some minister of religion, or in the case of Jews and Quakers, of their proper and ordinary officers. Indeed, for the most part, except among Roman Catholics and Episcopalians, marriages are celebrated in private houses.

(b.) *Marriages after Notice to Registrar in lieu of Banns.*—This partial assimilation of the law of Scotland to that of England and Ireland was effected only as recently as the session of last year—[41 & 42 Vict., c. 43]. The chief provisions of this statute are to enable ministers, clergymen, or priests in Scotland to celebrate marriages on a Registrar's certificate; but that no minister of the Church of Scotland shall be bound to celebrate upon it alone. Such certificate is to have equal authority with a session clerk's certificate as to authorizing a regular marriage. The notice of a marriage under this certificate must be posted on the door or outer wall of the Registrar's office for seven days; and if no objection is made against such intended marriage, the Registrar must grant the certificate as of right.

(ii.) *Irregular or Clandestine Marriages.*—(a.) *Marriage per verba de præsenti, or sponsalia per verba de præsenti*; this is a present interchange of consent between man and woman to become thenceforth husband and wife without publication of banns, or the intervention of a minister of religion. Such interchange of consent is a valid marriage, whether the consent is declared—(a.) Openly before a Justice of the Peace, a civil Registrar, or any person professing to celebrate

marriages \* (β.) Or in the most secret or private manner between the parties themselves, with or without witnesses, or any subsequent acknowledgment, or matrimonial cohabitation.

(b.) *Promise subsequente copula*, or *Sponsalia de futuro cum copula*.†—This is a *written* promise given by the man of future marriage, or a promise *afterwards confessed upon oath of either party*, followed by carnal intercourse. Such intercourse, unless accompanied by such written or confessed promise, is no more in Scotland than in England or Ireland than mere concubinage. The oaths of witnesses in whose presence such promise might have been given are not sufficient to constitute such intercourse marriage; nor will the oath of either party be taken for such purpose, when the effect would be to invalidate a subsequent marriage; in this last case the only means of proof is writing.

(c.) *Habit and Repute*.—These are merely evidence of a marriage, but do not constitute it.

It is only fair and necessary to mention that the authorities are divided as to whether *sponsalia per verba de præsenti* and *sponsalia de futuro cum copula* are, without more, marriages or not. One school hold that though irregular, they are valid marriage contracts, as far as they go; the other, that they are not marriage contracts proper, but rather espousals, or binding pre-contracts, which require a judicial sentence to be pronounced in the lifetime of the parties before they can become actual marriages. It would, however, be foreign to our purpose, and occupy much more time and space than are at our disposal, to discuss these rival theories, and the arguments which form their basis. But as the pre-

\* It was the last kind of marriage which used to be celebrated by the Gretna Green Blacksmith, until Lord Brougham's Act [19 & 20 Vict., c. 96] ruined his trade and occupation by compelling parties who were seeking marriage to have resided at least 21 days in Scotland.

† These are the only true espousals, for the others operate as a valid matrimonial contract without more.

ponderance of legal decisions is in favour of the view of the first, we must take it as the law of the country north of the Border.\* Let us consider a few of the results that flow from this state of things. Secret writings between man and woman, known only to themselves, operate as constituting a valid marriage; though the nature of their relations to each other be kept secret, and the persons do not cohabit as man and wife. Words of present matrimonial consent exchanged between a man and a woman who has lived with him as his mistress, will constitute a valid marriage, giving the woman rights of wifeness, and legitimating the children previously born. Writings proving a promise, *subsequente copula*, will invalidate any later marriage, however solemnly contracted, and however secret the previous promise and the subsequent intercourse may have been kept. Consent is not essential to marriage; and there may be a marriage by promise, *subsequente copula*, where, in point of fact, consent has never been interchanged, and where the parties do not know that the law holds them to be married.

The following scheme summarizes the chief points in which the laws of the three kingdoms show marked discrepancy from each other:—

1. *Consent of Parties.*

Scotland. In irregular marriages the consent of both parties is not necessary where there has been a promise *de futuro cum copula*. [*Leslie v. Leslie*, 22 D. 993; *Reid v. Lang*, H.L. 14 May, 1823; and *Sim v. Miles*, 30 Nov., 1829.]

2. *Publicity and Notice.*

England. [a.] Marriage must be preceded either by publication of banns, special or common licence, or by Registrar's certificate or licence.

[b.] The clergy of the Established Church may require,

\* *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Rep. 54.

but cannot enforce, a seven days' previous notice before publishing banns, with information on certain points as to the names and residence of the parties.

Ireland. [a.] Roman Catholics can dispense with the licence or notice of residence.

[b.] The Episcopalian clergy are not empowered to make such requisition. The Presbyterian ministers, however, are compelled to require a six days' notice from the parties of such residence, &c., &c.

[c.] The surrogate is required to send a copy of every notice for a marriage licence as received by him and entered in his book to the incumbent of the parish, or of each of the parishes, if different, in which the parties dwell.

[d.] No exhibition of notice is required in the Registrar's office unless the marriage is to take place in it.

Scotland. [a.] Regular marriages between persons of all denominations, if not preceded by Registrar's certificate, must be by the publication of banns in the parish church, *i.e.*, the Established Church of the parish.

[b.] The session clerk of the parish requires a statement verified by a certificate of two householders, or an elder of the parish, that the parties or one of them have or has resided for six weeks in the parish, and are and is personally known to the householders or elder, &c., &c.

### 3. *Publication of Banns.*

England. [a.] Banns must be published on three consecutive Sundays.

Ireland. [a.] By Episcopal licence, Roman Catholics dispense with the publication.

Scotland. [a.] Banns may be cried thrice on one Sunday.

4. *Presence of an Official at the Ceremony.*

England. [a.] The presence of some authorised officer, religious or civil, as well as that of two witnesses, is required at the marriage ceremony.

[b.] The presence of a marriage Registrar is requisite in all cases where the marriage is not according to the rites of the Established Church.

Ireland. [a.] Roman Catholics do not require as a necessity two witnesses.

[b.] The presence of a Registrar is dispensed with when the marriage takes place at the meeting-house mentioned in the certificate or licence, and not in his own office.

Scotland. [a.] Mere consent of the parties is sufficient; and an authorised official or witnesses are not necessary to contract an irregular marriage. Indeed a marriage before a minister of the Establishment was set aside as a nullity, because there was no real binding intention of marriage between the parties. [*Jolly v. MacGregor*, 3 Wil. and Shaw 85.] A present interchange of consent between man and woman to become thenceforth husband and wife, openly or privately given, with or without witnesses, or subsequent acknowledgment, is a valid marriage.

A promise of future marriage, either written or confessed upon oath, *cum copula*, constitutes a valid marriage.

[b.] The presence of a Registrar is not needed in any case at a marriage on his certificate.

5. *Time within which a Marriage must take place from Date of Publication.*

England. [a.] Three months from date of last publication.

Ireland. [a.] Marriages of Presbyterians do not seem

limited as to their celebration within any particular time from the last publication of banns.

Scotland. [a.] Same period as in England.

After the foregoing statement of the chief provisions of the Laws of the United Kingdom as to the preliminaries of marriage, and of the variances between them, we can properly pass on to discuss the desirableness of assimilating them, and of making a Civil ceremony of marriage compulsory. We cannot offer any opinion on this portion of our subject more terse and better expressed than that offered by some of the witnesses before the Royal Commission, and by the Commissioners themselves. Mr. Moncrieff,\* said, "No one can doubt the excessive inconvenience of having different systems of constituting the most important of all social relations, prevalent in countries so nearly identical in character and interests, and so closely allied, both by ritual and political relations. The object of assimilation is important and desirable beyond doubt, but it is far from being easy of attainment." Mr. Boyd Kinneart† says, "A good general marriage law ought to embrace the maximum of simplicity and the maximum of certainty. Of simplicity, because it affects every class and almost every person. Of certainty, because it affects a contract and social relation, the most important that can arise between human beings, because it affects the foundations of society itself." Dr. Ball,‡ now the Lord Chancellor of Ireland, also gives some valuable evidence on this point. He says that it is an important question to the Irish, to know what is the Scotch marriage law because the traffic and intercourse between the North of Ireland and Scotland bring the people of the two countries into close union, from which frequent marriages result. Though marriage without witnesses is easily contracted in Scotland, it is very difficult to prove in

\* Report of Commission, App., p. 59.

† App. 47.

‡ App. 187.



the Courts there, because the oath of the contracting parties is not taken ; but if one of the parties in a suit, say for restitution of conjugal rights, alleging a secret marriage *per verba de præsenti* selects an Irish tribunal, then he or she becomes at once a competent witness to prove the marriage. Dr. Ball proceeds to remark, " A marriage of this kind can be constituted equally between persons not domiciled Scotch, or domiciled Scotch, if the interchange of consent be in Scotland ; so that the consequences of this facility of proof outside of Scotland are very extensive."

We are fully aware of the enormous difficulties that lie in the way of assimilation, and that a huge *vis inertiae* must be first overcome. While legislating for the three kingdoms, it would be unfair and unwise to impose upon the other two the laws of the third. Although, on the whole, the English law may be better adapted for obtaining the proper publicity of marriage than that of Scotland or Ireland, it has serious defects, and in some respects is inferior in its preventive provisions to the Scotch. The English clergy complain that our present system of banns is a fruitful source of falsehood and deception. There is no effective means of checking marriages under the ordinary licence. As for Ireland there is a law for nearly every denomination, and the laws affecting Roman Catholic marriages are dangerous in their simplicity. It need hardly be said that the irregular marriages of Scotland should be made impossible. We must codify and simplify ; taking the good out of each and making an intelligible and harmonious whole. The basis of such a code, we hold, must be a compulsory civil ceremony, as the one legal and valid method of contracting marriage. This civil ceremony must be one that from its surroundings against fraud and clandestinity should commend itself to the community. We uphold the sanctity of the nuptial bond, and think most strongly that if persons desire it, the blessings of Heaven should be invoked on the momentous step which they are taking at marriage ; but marriage is a civil contract, and

is under the control of the State, whose duty it is to be absolutely impartial and indifferent, and to found its matrimonial legislation upon the necessity and duty of regulating its civil conditions and effect. Mere registration will not carry out the reforms needed ; to register the fact of marriage is not enough ; publicity must be insured before the contract is entered upon ; the mischief has been perpetrated before the cure can be applied to it.

Why should there be two different sorts of ceremonies, both equally valid, when, as matters now are, we find an unsatisfactory state of things ; whereas, if there were but one, certainty would be substituted for doubt and danger ? In countries like France and Germany clandestinity in marriage is a thing almost unheard of, and fraud but rarely meets with success ; and in those countries a civil marriage is a *necessity*, and a subsequent religious ceremony *optional*. This is the model from which we should copy.

We well know that bitter opposition will be raised against this proposal. From the clergy such opposition is natural, for they would hold their sacred functions defiled by it, and their rights curtailed. But in these days public opinion will not compel all to undergo a religious ceremony ; so there must be some other mode of contracting marriage, viz., a civil one. To this all can resort without offending their own convictions, or hurting the feelings of others. We cannot make a religious ceremony compulsory, because all do not profess to belong to some religious denomination. To those who intend to contract a "mixed marriage," *i.e.*, one where both parties are not of the same communion, the compulsory civil contract would afford a sure and certain means of avoiding the difficulties and doubts as to validity which now often arise. It might well be conceded that marriage is a sacrament, and the blessings of heaven should be invoked on the union of man and wife ; and the State should do all in its power to inculcate godly and religious life and teachings ; but as the strength of a chain

is that of its weakest link, so in social matters we must consult the feelings of those of our brethren who claim to have the most tender consciences, who are generally those who object to any religious or dogmatic formulæ.

To our clerical objectors we would remark that we are, under our proposed scheme, reverting in a sense to the usages anterior to the Council of Trent. "The solemnization of marriage was not used in the Church before an ordinance of Innocent III.; before which, the man came to the house where the woman inhabited, and carried her with him to his house; and this was all the ceremony."\* [This was the *deductio in domum* of the Roman law.] When the religious rites are performed over a couple, or one of a couple, who do, or does not believe in what is being uttered, more harm than good is done. There can be no spiritual magic in the repetition of a few words which fall only from the lips, and proceed not from the heart, as it were from a fountain source. What especial blessing can be claimed for the saying of sentences which are held, if not utterly false, yet utterly meaningless, by those over whose heads they are pronounced? It is in the interest of spiritual things, in the interest of the Church herself, that her ceremonies should not be made a mockery and a laughing-stock to those whom fashion bids use them. If the Church chooses to thunder forth her warnings and her anathemas against civil marriages, let her do so; she must be protected against herself. The presence of the priest is not necessary for the perfecting of the sacrament of matrimony; it never was, and is not now. Sanchez, the Jesuit of Cordova, who wrote a treatise on Marriage, writes [Lib. 2, Disputatio vi., p. 121.] : "Cæterum omnino tenendum est nunquam parochum fuisse, nec post Tridentinum esse ministrum sacramenti matrimonii; et ita, ante Tridentinum, clandestinum matrimonium fuisse verum sacramentum. Probatur [1]

\* Viner's Abridgment.

Quia cum matrimonium sit contractus, nec illius naturam Christus mutaverit, sed tantum elevarit ad esse sacramenti, sequitur aliorum contractuum naturam, quæ est, ut ipsi contrahentes suis consensibus se ligent, nec alios præter ipsosmet contractus afficiat. [2.] Quia ante Tridentinum matrimonia clandestina erant vera matrimonia et rata. [3.] Quia verba parochi non sunt de essentia matrimonii, sed iis penitus omissis constat matrimonium ut dicemus, &c., &c. . . . ergo parochus nullo modo est minister." He returns to this contention of his later on, Lib. 3, Disp. xxxviii., p. 297, where he says: "Ea verba [id est, 'Ego vos in matrimonio conjungo in nomine Patris, et Filii, et Spiritus Sancti'] non sunt de essentia matrimonii, quam licet omittantur, validum est . . . si audito utriusque consensu parochus dicat 'Ego *postea* vos jungam,' non impediri effectum matrimonii; quia mutuo consensu conjugium jam initum est.'" Sanchez draws a distinction between such parish priest not asking the couple if they intend to marry each other, and his not asking them if they have any lawful impediment to such marriage; in the first instance the priest commits a venial, in the latter a mortal offence.

If we look at the working of the Code Napoléon in France, which enjoins a compulsory civil ceremony, we shall find a result very favourable to our scheme, and that it does not deter the vast bulk of the people from adding the religious rites.

1. The civil ceremony takes place [except by extreme indulgence] at the Mairie, Hôtel de Ville, or Maison Communale, of the Arrondissement. The Mayor, or his deputy, presides, and all the parties interested in the ceremony attend. The presiding officer then asks the consent of the proper persons; next he asks the man, "Do you, A. B., declare that you take for wife C. D., here present;" and the woman, "Do you, C. D., declare that you take for husband A. B., here present." Lastly, he says, "In the

name of the law I declare that A. B. and C. D. are united by marriage."

2. The antecedent public notification that a marriage between given parties is intended; the reception and the disposal of objections to the proposed union; the acceptance of the consent of the requisite parties; the administration of the civil rite whereby the marriage is completed—the formal recording of it in registers; and the preservation of the evidence to prove the marriage, are placed exclusively in the hands of the civil functionaries.

3. The civil ceremony makes the marriage *in the eye of the law*, to all intents and purposes, complete; and no minister of religion can officiate or interfere except under severe penalties until a certificate has been presented to him certifying that the parties have contracted matrimony before the civil magistrate. But every encouragement is offered for the subsequent interposition of the sacred office, and the certificate of the secular union is granted expressly *pour servir aux cérémonies religieuses*; and the average result is that in at least 95 cases out of 100 the parties who contract before the civil officer ask afterwards and receive the sacerdotal benediction which is usually preceded by three publications of banns.

Having attempted to establish our premises we will now shortly propound a scheme which we think will logically and practically carry them into effect. As we have concluded that there should be a compulsory civil element in marriage, there present themselves at least three courses from which to choose:—

i. *That all Parties must be Married at a Registrar's Office.*—This we think would be going too far for the people of the three kingdoms, and would too grossly shock our sensibilities.

ii. *That a Marriage Registrar must Attend all Marriages.*—This has been found very irksome and troublesome in practice, and has been abolished in Ireland for some time without any harmful results arising.

iii. *That all the heads of the different denominational bodies, all the clergy, and ministers and officers in the active exercise of official duties in their several churches and denominations should have co-ordinate jurisdiction with the district Registrars as now appointed to grant licences to marry; but before the parties participate in any religious rite or service, they must declare before such clergymen, ministers, officers, or Registrars, as a civil act, their mutual intention to marry.*

The scheme embodied in this last proposition is the one to which we would call attention, and the establishment of which we now advocate. Only those persons who occupy positions which make them amenable to public responsibility, and to the censure and discipline of their own religious communities, whether belonging to an established or non-established church or communion, should be eligible to perform such duties. Among these would be included such as from time to time take a temporary charge, and curates serving under an incumbent of a parish, and such religious or ecclesiastical officer among other denominations as would answer to a curate of the Established Church in England. These should not derive their authority to be the civil witness from their Ordinary, or rites of ordination, or other ecclesiastical or religious sources of power; but from the State, and from the State alone in all cases. These clergy, ministers, or other officers, should enter into like bonds as the district Registrars and the surrogates in Ireland, under 33 & 34 Vict., c. 110, do now for the proper fulfilment of their duties; the sum might be the same, £100.

Marriage must be made cheaper than it is; the fees charged for the Registrar's certificate and licence, and for the common licence, are far beyond the reach of the poor, and even of those who are fairly well-to-do. The notoriety attending the publishing of banns, and possibly the fees in some places attached to it, deter many a couple from marriage, and drive them into concubinage. A charge

of some small sum, such as 7s. 6d.,\* should be legally demanded on the completion of the civil ceremony. The clergy, proper ministers, and Registrar should be entitled to retain 4s. out of this as a reimbursement for time and expenses, if the parties are married before the clergyman, minister, or Registrar, who granted the certificate of notice. If the parties are married by some other clergyman, minister, or Registrar, he should be entitled to demand a fee of 2s. 6d.; this would act as a kind of penalty for marrying out of their parish or district. The balance of 3s. 6d. is to be accounted for to the Registrar-General by the clergyman, minister, or Registrar issuing the certificate. When a religious ceremony is added, no fees are to be taken by the celebrant. We think that, while the Registrar-General and his subordinates are now paid out of the Consolidated Fund for *all* their work, the fees arising from the number of marriages, some 200,000 per annum, would go a long way to pay for and support the extra machinery and labour necessary to carry out our plan.

The Superintendent Registrar would, as now, keep his office for the carrying on of his duties; but the incumbent of a parish, or other authorised minister of religion, would have to set apart some room, perhaps his vestry would be the best, for carrying on his new duties. The nature of the room should be described outside. Here parties applying for a certificate would come; and in it must they first be civilly married. In this room should be kept the books of record, in which are to be inscribed the application for the certificate, with all necessary information for the notice, and any objections that may be made against the issue of such certificate. All churches, chapels, and meeting-houses,

\* This may be divided as follows:—2s. 6d. for entering the notice; 5s. on the grant of the certificate. The fees of paupers might be provided for out of the rates, or a reduced fee taken, or the fee altogether remitted; but we should advise that such remission should only be temporary, and always a debt due from the persons in whose favour it was made.

for the ministers of which it may be desired to obtain the power and privilege of solemnizing marriages, ought to be properly certified by the Registrar-General for that purpose.

By this means, those who wished altogether to do without a religious ceremony, could resort, as now, to the Registrar, and be married before him. Those who were minded to be married as well according to the rites and ceremonies of their own denominations, would not be forced to go out of their own fold to contract their union, and be spared the irritation and unpleasantness of going to such a purely secular officer as the Registrar; but would have recourse to their spiritual pastor, and so be never out of his direction; but before him civilly as well as spiritually would they declare their consent to become man and wife. Those who minister in holy things, while checked by their responsibility to the State, would yet be able to preach and enforce chastity and morality, and preserve their influence over the solemn and holy act of matrimony unimpaired.

The more important preliminaries which we should recommend to be enforced before the grant of the certificate of marriage are the following. It must, however, be borne in mind that this is only a very short and rough sketch of what ought really to be done.

The Registrar, clergyman, or minister should be able to satisfy himself that the party applying for a certificate has resided for at least the *four* preceding weeks in his parish or district, or attended his chapel, or meeting-house. It is the shortness of the period of residence, and the difficulty, nay almost impossibility, in some portions of the United Kingdom of ascertaining whether there has really been any residence in that place in which the parties say they have dwelt, that encourage frauds, falsehoods, and secret and improvident unions.

They should also be empowered to ask for answers on oath to questions such as these: (i.) If either party is a widow or widower, when the former husband or wife died?



(ii.) Whether either party is in any and what manner related to the other party, or to any former husband or wife, of the other party? (iii.) When the residence of the party giving the notice in the parish or district where it is given first began; and, if within six months before the date of the notice, what was previously his [or her] usual place of residence? (iv.) If either party is a minor, alleging consent of a parent or guardian, what is the place of residence and address of such parent or guardian? (v.) If both parties do not give notice to the same clergyman, minister, or Registrar, to whom, and at what place, is the notice of the other party given?

The answers to all or some of these questions [as the case may be] should be incorporated in the notice, and entered in the notice book, which must be open to inspection at all reasonable times.

As there is no reason why persons intending to marry should be married at any particular place, but there is good ground for those interested in the projected match having every opportunity of knowing what is going on, and preventing what they might consider a harmful and improvident marriage, there ought to be established in England, Scotland, and Ireland; a central office, called the "Marriage Notice Office." In it every intended marriage must be recorded for a certain time, which cannot become a valid marriage until a certificate that the notice has been filed the proper length of time, and no opposition to the marriage has been made, issues from this office to the proper officer who has originally filed it.

When a clergyman, minister, or Registrar has entered a notice for a certificate, he should at once transmit to the "central" office a true copy of it, which should at once be entered in the books of the "central" office, and there remain for a period of not less than *fifteen* days; on the expiry of which a certificate, to the effect that the notice has been filed the proper number of days, and that no

opposition has been communicated at the "central" office to the intended marriage, should be sent back to the clergyman, minister, or Registrar who communicated it. When any notice shall have "forbidden" written against it, whether in the "central" or "branch" office, all proceedings depending upon it should at once become null and void. The fact of its being recorded against the notice at one office should be immediately transmitted to the other.

On the following day after the receipt of this certificate from the "central" office at the "branch" office, the parties may apply for it, and be married then and there in such "branch" office, at any convenient hour of the day, with open doors, and in the presence of at least two witnesses, besides the officiating minister or officer. A duplicate copy of the certificate of marriage should be given to the parties and the other retained by the officiating clergyman, minister, or Registrar, and filed; and a quarterly return of such certificates should be made by them to the Registrar-General.

The parties when about to be married must produce to the officiating clergyman, &c., the certificate countersigned by the clergyman, &c., to whom application was first made for it, that the notice has been filed the proper period, without any objection appearing on it; and this certificate should only be valid for three months from the date of its grant.

At some part of the civil ceremony, the parties must declare in the presence of the proper persons, "I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.;" and shall say to each other, "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]." Those who wish now to add the religious ceremony can repair to their church or meeting-house, and be there married according to the forms of their communion or society; but before the religious ceremony is performed the parties must produce their cer-

tificate from the clergyman, &c., that they have been civilly married. The clergy of the Established Church, or the ministers of other denominations, shall not be bound to keep an official record of such marriages.

Under this system there need not be any such publicity as would offend the most sensitive, and considerably less than under the publication of banns, for which there would no longer be any reason, or under the Registrar's certificate. The presence of the marriage Registrar at the different marriage ceremonies would now be dispensed with. There would be no need for the suspension of the application for the certificate either in the "central" or "branch" office. An inquiry and search by the interested parties, who would know where to look, in the books of either of the offices, would be sufficient to inform them as to what they wished to know, and enable them, if they thought proper, to prevent the intended marriage.

In cases of urgent need it should be permitted to the heads of the clergy, and the chiefs of the different denominational bodies, and the Superintendent Registrar of districts to dispense, for good cause shown, with some of the preliminaries in cases where they might advantageously be omitted. As clergymen are now, so they in the future, and all those who minister in holy things, may safely be trusted to perform this duty of a witness to marriage in strict integrity and uprightness: nay, their bias, if any, would be to strictness in seeing that fraud and secrecy were defeated. If they felt disposed to forget their duty, the sense of responsibility, and liability to a heavy fine, would deter them from carrying out such intentions.

We have now laid before the reader some of the material facts which in the space allotted to us we are enabled to marshall in support of the contention that our marriage laws should be codified, and in the place of the numberless methods of contracting valid marriages, one uniform legal method should be adopted, which, owing to circumstances,

must be civil. We have pointed out how discrepant are the laws of the three kingdoms ; to what risks and dangers this want of uniformity may tend ; how well founded is the cry for a simple and general law of marriage for these islands ; and we have been venturesome enough to propose a plan for carrying our ideas and aims into practical working. To simplify conflicting laws, differences must be reconciled, toned down and harmonized ; and the good in each system preserved and made part of the new entirety. Our scheme, we venture to suggest, in some part meets these requirements. While demanding a compulsory civil ceremony, it yet leaves unfettered the power and influence of those in sacred offices over this holy and revered bond ; while embracing all the more salutary provisions of the English system, it borrows suggestions from the Irish ; and adopts from the Scotch all those wholesome and stringent regulations touching the consent of interested parties to the intended marriage, and the residence of the couple contemplating matrimony, which prevent hasty, secret, and improvident nuptials. If it be found impossible so to assimilate at once these conflicting laws, let us not shrink from attempting the experiment upon ourselves in England ; and if found successful, gradually to extend to the sister kingdoms the advantages which they may ultimately be willing to adopt. This probably will be the future of any such measure as we have here advocated. In conclusion, we will quote the words of Lord Selborne\* on the difficulty of procuring a ready acceptance of large and important measures of reform : “ It is a misfortune of the times in which we live, that any large or comprehensive legislation on those subjects which touch most closely the highest interests of all classes of men, seem to be impossible unless some popular or political excitement can be got up about them.”

W. P. EVERSLEY.

\* Debate on the Marriage Preliminaries Bill, 1878. Hansard, Vol. 142, p. 1248.

#### IV.—ON THE JURISDICTION OF THE HIGH COURT OF JUSTICE IN DIVORCE.

THE case of *Niboyet v. Niboyet*, reported in the February number of this year's Law Reports (4 P.D. 1), has introduced so much confusion and uncertainty into the existing law with respect to the Divorce Jurisdiction of the High Court of Justice, that an examination of the authorities and principles relied on in the argument and in the conflicting judgments may be of advantage.

The question involved is, speaking generally, this: Can a divorce be properly pronounced by any Court which is not the Court of the matrimonial domicil, *i.e.*, the domicil of the husband? \* More particularly: Can the English Court properly pronounce a divorce when the domicil of the husband is not English? This question may again be varied by asking: Has the English Court *jurisdiction* to pronounce such a divorce? The meaning intended to be conveyed by the two expressions is in fact the same. Amplifying it, it is this: Do the rules of private international law, so far as they are adopted, followed, or recognised by English Courts, authorize the English Court to pronounce a divorce in such a case? This is the question which *Niboyet v. Niboyet* purports to answer, and it answers it in the following way. Sir R. Phillimore and Brett, L.J., say that such an assumption of jurisdiction is unauthorised; that by the law of nations and the law of England, domicil and domicil alone is the essential circumstance which gives any Court jurisdiction to dissolve the matrimonial bond; and that inasmuch as M. Niboyet's domicil is confessedly French, by the admission of the parties and as a matter of

\* The cases where a wife may, *after desertion by her husband*, retain or even acquire a domicil distinct from his for such purposes (see *Le Sueur v. Le Sueur*, L.R. 1. P.D. 139) are omitted from the consideration of the present subject. They are not pertinent to that branch of it which is discussed here.

law (or rather, as a legal presumption of a fact), the English Court cannot, at the instance of the wife, interfere with his marriage tie. On the other hand, James & Cotton, LL.JJ., are of opinion that the domicil of the husband is not the true test; that the Divorce Act (20 & 21 Vict., c. 85) was intended to give the Court which it constituted power to deal with all matrimonial matters in England, and that upon the true construction of that Act the divorce of a Frenchman "resident" in England, but retaining his French domicil, is such a matrimonial matter. Sir R. Phillimore's opinion having been pronounced in the Court below, and not in the Court of Appeal, the judgment of Brett, L.J., has been over-ruled by the voices of James & Cotton, LL.JJ. It is almost unnecessary, however, to say that on a subject to which Sir R. Phillimore has devoted especial attention, the opinion of one of the most eminent living English experts in international law is entitled to at least as much respect as that of any other judge; and it is quite plain that some day a decision will have to be pronounced in the face of what is, so far as *Niboyet v. Niboyet* is concerned, an equally balanced conflict of authority.

It may be convenient to mention here, very briefly, the few material facts of the particular case. The husband was French by nationality and domicil of origin, and married the petitioner, an Englishwoman by birth and domicil, at Gibraltar, in 1856. From 1862 to 1869, the husband filled the post of French Vice-Consul at Sunderland, and, from 1875 till the institution of the suit, the post of French Consul at Newcastle. The alleged adultery was committed in England. The husband had admittedly never acquired an English domicil, but he and his wife (so far as these expressions are legally consistent) were resident in England, except so far as residence implies or includes domicil. The admission by the petitioner that the domicil of the husband had remained French was probably based on the rule of international law that a consul does not, by

residence *quà* consul, acquire a domicile in the country where he so resides.\* It may, however, be incidentally remarked on this point that there is nothing in the rule of law referred to to prevent the acquisition by the husband of an English domicile by any residence or stay in England during the interval between his two terms of consular office; and that if he did in fact reside in England during any portion of that interval, the petitioner was hardly wise to admit that her husband's domicile had always remained French. A domiciled Englishman can act as consul for France in England, just as a foreigner can act as consul for England abroad, without his legal domicile being in any way affected; and M. Niboyet, if he had acquired an English domicile between 1869 and 1875, would not have lost it by accepting the office of French consul in the latter year, any more than if he had been born within the sound of Bow Bells.† This is, however, a by-point, it being an admitted fact on the pleadings in *Niboyet v. Niboyet* that the husband's domicile did continue French, and that the statement of his "residence" in England must be taken, subject to the first admission. Under these circumstances, it is proposed to show that the English Court had no jurisdiction to entertain a petition for his divorce at the instance of his wife. To establish this, an attempt will be made to prove (i.) that domicile is, by authority and analogy, the only and the necessary test of jurisdiction; (ii.) that the distinction drawn by the majority of the Court of Appeal between domicile and home is, from a legal point of view, a false and vicious one.

(i.) The first of these propositions is the natural result of four minor ones, which may be stated as follows:—

1. *No English Court has ever recognised the validity of a foreign divorce, whether the marriage was one contracted in*

\* *Maltass v. Maltass*, 1 Rob. E. 79. *Heath v. Sampson*, 14 Beav. 441.

† See *Sharpe v. Crispin*, L.R. 1, P. & M., 611.

*England or not, where the domicil of the parties was English at the time the divorce was pronounced.*

2. *No English Court will refuse to recognise the validity of a foreign divorce, if the parties were at the time it was pronounced domiciled within the jurisdiction of the foreign Court pronouncing it.*

3. *No English Court, before the present case, has ever assumed to pronounce a divorce in any instance where the domicil of the husband was not English at the time, with a single exception. In that instance,\* the husband, though after deserting his wife he had acquired an American domicil, was and remained English by nationality.*

4. *No foreign Court, and no foreign jurist, of any repute, would recognise the validity of a divorce pronounced by an English Court, unless the condition of English domicil were satisfied. If that condition were satisfied, the English divorce would in all cases be recognised.*

The foregoing propositions, if established, will place the last decision of the Court of Appeal in the following light. English Courts have hitherto regarded domicil as the one necessary condition to found the jurisdiction for a foreign divorce. Foreign Courts have hitherto regarded domicil as the one necessary condition to found the jurisdiction for an English divorce (and, it may be added, for a foreign one). According to *Niboyet v. Niboyet*, English Courts are *not* henceforward to regard English domicil as an essential condition to found jurisdiction for an English divorce. That is to say, the English Court is to assume jurisdiction which it refuses to admit that a foreign Court, under similar circumstances, is entitled to assume; and which foreign Courts neither assume themselves, nor recognise if assumed by others.

It is quite plain, that if this is the true effect of the decision animadverted upon, it is absolutely destructive of the whole principle upon which international law, private as well as

\* *Deck v. Deck*, 2 Sw. & Tr. 90.



public, is based. No State is bound, of course, to limit its own ideas of its own jurisdiction by the ideas which its neighbours take of theirs. But every State is bound, in law, in reason, and in morality, to hold the same ideas with respect to its own jurisdiction that it does with respect to theirs. It is not at liberty to measure its own rights by one rule, and its neighbours' rights by another. It is not at liberty to deny that its neighbours have a right to divorce married couples not domiciled within their borders, and at the same time to assume to itself the jurisdiction which it declines to recognise in them.

With these preliminary remarks, it is now proposed to consider the cases bearing on the propositions which have been advanced.

(1.) *No English Court has ever recognised the validity of a foreign divorce, where the domicil of the parties was English.* In establishing this proposition, it must be admitted that the English Courts began by intimating that they would refuse to recognise a foreign divorce of an English marriage at all. The rule was undoubtedly laid down in *Lolley's* case,\* and afterwards followed by Lord Brougham,† in the simple terms that no divorce abroad can dissolve a marriage contracted in England. Both these cases were, however, fully considered in *Warrender v. Warrender*,‡ by the House of Lords, sitting to hear Scotch appeals; and the report of that case clearly shows, not only that Lord Brougham disapproved of the rule, as broadly stated in *Lolley's* case (to the decision of which it was unnecessary), and of the expressions adopting it which were attributed to him in *McCarthy v. Decaix*, but that it was a rule absolutely inconsistent with the unanimous decision of the House of Lords in the later case.§ *Warrender v. Warrender* established that

\* R. & R. C. C., 237.

† *McCarthy v. Decaix*, 2 Cl. & F., 568 (n).

‡ 2 Cl. & F., 488.

§ It must, of course, be remembered that when the rule was first laid down, the English law did not recognise divorce, except by Act of Parliament, at all.

the Scotch Courts had jurisdiction to dissolve a marriage contracted in England, where the domicil of the husband was Scotch; and though the House of Lords was then sitting as a Scotch Court of Appeal, it must be remembered that on all questions of international law, the law of Scotland and of England is theoretically the same. The remarks of Lord Brougham on the effect of the Scotch domicil are peculiarly significant. "This is the case of a marriage contracted in England, between a man, Scotch by domicil and birth, and a woman about to become Scotch by the execution of the contract. It is, moreover, the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicil in Scotland, and his wife had the same domicil by law. To term a marriage, so contracted, an English marriage, hardly appears to be correct. I am sure that it is, if not wholly a Scotch contract, at the least a contract partaking as much of the Scotch as of the English." Conversely, it was decided by Dr. Lushington, in the English Consistory Court, in 1831, that a Scotch Court had *not* power to decree a divorce where the domicil of the parties was at the time of marriage, and remained, English;\* and an exactly similar decision was given, on the same ground, in 1858.† In *Pitt v. Pitt*,‡ before the House of Lords (a Scotch appeal), the counsel for the petitioner (Sir R. Phillimore and Sir H. Cairns, the present Lord Chancellor) abandoned "as untenable" the ground "that divorce *a vinculo* might be validly granted to strangers not domiciled, though temporarily resident, within the jurisdiction;" and the petitioner failing to establish complete domicil, the relief sought for was denied to him. Of this abandonment the Lord Chancellor (Lord Westbury) said, that it was "a concession which he trusted was, in the opinion of their Lordships, quite in accordance with the law

\* *Conway v. Benzley*, 3 Hagg. Cons. 639.

† *Robins v. Dolphin*, 1 Sw. & Tr. 37.

‡ 4 Macq. 627, 633.

of the case.”\* The principle involved in these cases came again before the House of Lords in *Shaw v. Gould* (1868),† and it was then again laid down that a foreign tribunal had no authority to pronounce a divorce in the case of an English marriage between English subjects, unless such subjects were, at the time of such divorce being pronounced, *bonâ fide* domiciled within the jurisdiction of such tribunal, and the suit was brought without collusion. And in 1870, on the last occasion when the question came before the Courts,‡ Lord Penzance laid down the same law with regard to an American divorce of an English marriage, the parties not having acquired an American domicil. It is true that in the case last cited the husband was not even temporarily present in the State where the divorce was sought by the wife, but the decision was distinctly put on the ground that he was not *domiciled* there. “In no case,” said Lord Penzance, “has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by the tribunals of which the divorce was granted.”§ Proposition (1) has thus, it is hoped, been sufficiently established.

(2.) The second proposition, that an English Court will not in any case refuse to recognise a foreign divorce, if the parties were, at the time it was pronounced, domiciled

\* In Mr. Macqueen’s note to this case, he says: “This in effect affirms the legal necessity of a real Scotch domicil to give effect to a Scotch divorce; and had the point been argued on both sides, such would have been the true construction. But it was not argued for the respondent, whose able and experienced counsel were not likely to give up any contention that would have benefitted their client.”—4 Macq. 627.

† L.R. 3 H.L. 55.

‡ *Shaw v. Attorney-General*, L.R. 2 P. & D. 161.

§ L.R. 2 P. & D., p. 161. *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Tollemache v. Tollemache*, ib. 567; and *Tovey v. Lindsay*, 1 Dow. 117, may be cited in support of the same proposition, but as these cases are criticized by Cotton, L.J., in his judgment, it has been thought better to abstain from relying upon them.

within the jurisdiction of the foreign tribunal, rests rather upon suggestion than upon express authority. Except the case of *McCarthy v. Decaix*,\* with regard to which Lord Brougham's criticisms in *Warrender v. Warrender* of his own decision have been already referred to, there is no instance of such a refusal, and recent authorities have clearly indicated the view of the question that would now be taken. In *Shaw v. Gould*,† Lord Westbury, having referred to *McCarthy v. Decaix* only to dismiss it, puts the question in the following tentative form. "The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriage of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's* case." Two years later, in *Shaw v. Attorney-General*,‡ Lord Penzance expressed his opinion in the same direction even more plainly. "In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognise and act upon such a divorce, appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so, if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals." It may be added that this last condition is properly included in the idea of

\* 2 R. & My. 614; 2 Cl. & F. 568 (n).

† L.R. 3 H.L. 85.

‡ L.R. 2 P. & D., at p. 161.

domicil.\* I am not aware of any stronger or more direct authority for this proposition; but as it is entirely consistent with the reasoning of James & Cotton, LL.JJ., in *Niboyet v. Niboyet* (who would, it is presumed, even allow something less than domicil to give the foreign Court jurisdiction), it is probably unnecessary to discuss it at further length.

(3.) The third proposition—that there is substantially no precedent for pronouncing a divorce in cases where the domicil of the husband was not English—was not directly disputed in the judgments of James & Cotton, LL.JJ., but needs consideration, inasmuch as there are one or two cases which are said to impeach it, and were cited for that purpose on behalf of the petitioner. Upon careful examination, it appears that the only case, in which it can be contended that such a jurisdiction was really asserted, is *Deck v. Deck*.† Possibly *Brodie v. Brodie*‡ may appear to some minds an authority to the same effect.

*Deck v. Deck* was the case of a wife petitioning in England against a husband who had deserted her, gone to America, and there acquired a domicil, being by nationality (and domicil of origin) English. No counsel appeared for the husband, or for the Queen's Proctor, to dispute the jurisdiction, and the point was therefore not argued, though the Court did, it appears, entertain doubts, and took time to deliver judgment. The judgment, when delivered,§ founded the assumption of jurisdiction upon the *nationality* of the husband, which remained English. It is almost needless to remark that this is a test never applied, before or since, for the purpose; and that such a decision can hardly be relied upon in support of the proposition of James, L.J., that an

\* If the foreign country were collusively resorted to to obtain the aid of its tribunals, there would be no real *animus manendi*, and the foreign domicil would not, of course, be acquired for any purpose. Domicil, unless it is *bond fide*, is not domicil.

† 2 Sw. & Tr. 90.

‡ 2 Sw. & Tr. 259.

§ By Sir Cresswell Cresswell, for the full Court.

“English home” will authorise the Court to proceed. In *Deck v. Deck* there could have been no doubt that the abandonment by the husband of his “English home” was complete and irrevocable.\*

*Brodie v. Brodie* † was a different case altogether; and it is submitted that the decision there was really in favour of the domiciliary test. The petition was brought by the husband, whose domicil of origin was Scotch, and who had afterwards lived and acquired a new domicil in Australia. Coming to England, and “taking up his residence” there, he instituted a suit against his wife for adultery committed in Australia, where she still remained. His counsel, having offered to prove that he had abandoned his Australian and acquired an English domicil, obtained an adjournment for that purpose, and did in fact adduce evidence which went a considerable way in that direction. It was then said by the Court: “The question is, whether the petitioner has acquired an English domicil.” His counsel thereupon submitted, that “enough had been proved to establish domicil for the purpose of founding jurisdiction.” The Court said, that “they would give no opinion as to what the effect of the evidence might be in a testamentary suit, but they thought sufficient *bonâ fide* residence in England, not casual, had been proved to entitle the petitioner to a decree.” The comments of Lord Penzance upon this case, in *Wilson v. Wilson* ‡ and *Manning v. Manning*, § sufficiently show that the view taken of it by Brett, L.J., in his judgment in *Niboyet v. Niboyet*, at p. 18, is the true one. If

\* See the comments of Brett, L.J., on this case, expressing disapproval, at p. 18 (L.R. 4 P.D.).

† 2 Sw. & Tr. 259.

‡ 3 L.R. 2 P. & D. 435, 441. “It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled.”

§ L.R. 2 P. & D. 223, 226.

it was held that the petitioner's English domicile was established for the purposes of the suit, the judgment was right; if it was a decision that there can be a minor species of domicile, sufficient for one purpose and not for another, there is no reason or authority for such a distinction.

As it has been asserted that these two cases are the only ones which can, in any sense, be regarded as precedents for the assumption of divorce jurisdiction in cases of residence not amounting to domicile, it remains to dismiss very briefly the other authorities which were cited for the purpose by the petitioner's counsel. In *Ratcliff v. Ratcliff*,\* the domicile was and remained English. In *Firebrace v. Firebrace*,† a mere doubt was suggested whether suits for restitution of conjugal rights were governed by the rule admittedly applicable to proceedings for divorce. *Bond v. Bond*‡ was a case in which it did not appear whether the domicile of the husband was English or foreign. *Le Sueur v. Le Sueur*§ is directly opposed to the assumption of the jurisdiction, Sir R. Phillimore having there refused to grant a divorce, at the instance of the wife, the husband being domiciled abroad, though he held that, by the desertion of the husband, the wife had been enabled to acquire, and had acquired, a domicile of her own. *Simonin v. Maillac*|| and *Sottomayor v. De Barros*¶ were cases which turned upon the validity or nullity of a marriage *ab initio*, not upon the right of an English Court to dissolve it. So was *Lindo v. Belisario*,\*\* in which, by the way, the question of domicile was not referred to. *Lloyd v. Petitjean*,†† the only case cited which has not been referred to, simply decided that a marriage between an Englishman and a domiciled Frenchwoman, celebrated at the house of the British Ambassador in Paris, by the chaplain to the embassy, was valid. It is confidently

\* 1 Sw. & Tr. 467.

† 2 Sw. & Tr. 93.

|| 2 Sw. & Tr. 67.

\*\* 1 Hagg. Cons. 216.

† 57 L.J. P. & M. 41.

§ L.R. 1 P.D. 139.

¶ L.R. 3 P.D. 1.

†† 2 Curt. Eccl. 251.

asserted, therefore, that the decision in *Niboyet v. Niboyet* is *a departure from precedent*.

(4.) The fourth proposition, that domicil is the sole and necessary condition required by foreign tribunals and jurists for divorce jurisdiction, can only be proved by citation; and two or three citations only will be adduced, inasmuch as none of any authority, it is believed, can be brought forward against it. So far as America goes, Story,\* after citing the latest decisions, showing that "ordinarily a suit for divorce cannot be entertained unless the parties are *bonâ fide* domiciled in the State in which the suit is brought," proceeds (s. 230a): "The doctrine now firmly established in America is, that the law of the place of the actual domicil gives jurisdiction to the proper Courts to decree a divorce for any cause allowed by the local law." The opinion of Wharton is to the same effect, and further shows the view taken in Germany. "The Court of actual domicil has alone jurisdiction to pronounce a valid divorce, and a voluntary submission by the parties to any other tribunal is inoperative. This opinion is maintained by Bar (§ 92), by Savigny (VIII., p. 337), and is no doubt that of present German jurists generally."† As for France, the country primarily concerned in *Niboyet v. Niboyet*, and that in which the personal jurisdiction over subjects by reason of their nationality (whatever their domicil) is asserted more strongly perhaps than in any other, the note of Mr. Macqueen to *Pitt v. Pitt*‡ is the most accessible and trustworthy evidence. Mr. Macqueen, whose authority upon this special subject is undoubted, after a careful examination of *Bulkeley's* case, decided by the French *Cour de Cassation* in 1860, and a correspondence with the French judges, says as follows: "It appears that divorce *a vinculo*, properly obtained from the Court of the domicil, will always be

\* Conf. of Laws, ss. 228-230.

† Wharton. Conflict of Laws, sec. 210.

‡ 4 Macq. 649 (n.)



deferred to in France. . . . It would seem that divorce *a vinculo* can emanate from no other Court but the Court of the domicil." Lastly, it may be added that the Supreme Court of Melbourne, after a careful survey of the English authorities, has recently come to the same conclusion.\*

(ii.) The second branch of the argument relates to the distinction between *domicil* on the one hand, and *home* or permanent residence on the other, upon which the judgments of the majority of the Court of Appeal so considerably depend.

It may be remarked, in the first place, as a noteworthy fact with reference to the judgment of James, L.J., that it contains *not one single reference to a decided case*, being composed entirely of *a priori* reasoning, with some consideration of the effect of the wording of the English Statute which created the Divorce Court and defined its powers.† For aught that appears in the judgment, the subject of international jurisdiction in matters of divorce might have been coming for the first time under the consideration of an English Court, instead of having been a fruitful source of litigation for the last half-century. It is true that the Lord Justice concludes by observing that he does not think he is over-ruling any English case in granting the relief sought; but literally no other expression in his judgment betrays the slightest consciousness that any English case relevant to the subject is to be found in the Reports. The reasoning of the whole judgment is in substance the following:—

(a.) Prior to the creation of the Divorce Court, the Ecclesiastical Courts in England would have had jurisdiction in matrimonial matters from the mere "residence" of the parties, as distinguished from their "secular domicil."

\* *Duggan v. Duggan*, reported in the *Law Magazine and Review*, No. 227 (Select Cases, February, 1878), p. 223, and in the *Law Times*, December 29th, 1877, at p. 152.

† 20 & 21 Vict., c. 85.

(b.) The Statute 20 & 21 Vict., c. 85, was passed to constitute a Court with exclusive jurisdiction in matters matrimonial in England. A "matter matrimonial in England" is a matter matrimonial where the *matrimonial home* is in England.

(c.) The "matrimonial home" and the "matrimonial residence" are conceptions which the law can distinguish from the "matrimonial domicil."

Now it is submitted, with the greatest respect, that a fallacy underlies and vitiates all three of these propositions—a fallacy which is literally contained and formulated in the last (c.) To a certain extent, proposition (a.) begs the question. As no authority whatever is adduced for it (except the introductory phrase, "Can there be any doubt that," &c.?) it may be sufficient to say that though international law was in a less advanced state in the time of the old Ecclesiastical Courts, the old Ecclesiastical Courts were governed by exactly the same international principles as are the present secular ones; and further, that the legal conception of *domicil*, though of comparatively modern birth, owes more to the Ecclesiastical Courts, in which it was mainly perfected, than perhaps any other legal conception. The only two instances in the Ecclesiastical Courts which can be used in any way as precedents for the assumption of the jurisdiction without domicil have been already examined.\* The nature of the error involved in such assumption may, however, be best seen by considering (b.) and (c.), which contain the pith of the whole judgment.

Now, it is quite true that the preamble of the Divorce Act expresses that its object is "to constitute a Court with exclusive jurisdiction in matters matrimonial in England." It is, however, another assumption to read this as equivalent to "a Court with exclusive jurisdiction in such matters matrimonial as are 'matters matrimonial in England.'"

\* *Deck v. Deck*, 2 Sw. & Tr. 90, and *Brodie v. Brodie*, 2 Sw. & Tr. 259, ante p. 334.

With at least as much fairness, it may be taken as meaning "a Court with exclusive jurisdiction in England in matters matrimonial." Read fairly, the two versions come, no doubt, to the same thing. They mean "a Court which shall in England have exclusive jurisdiction over such matrimonial matters as are properly within the jurisdiction of an English Court." What is the test of this jurisdiction?

It is laid down by James, L.J.—in perfect accordance, so far, with the principles of international law—that the jurisdiction exists "where and while the matrimonial home is English."\* The test is a sound one, if followed out to its logical conclusion—a conclusion accepted by Brett, L.J., and Sir R. Phillimore, but rejected by its framer. The condition that the matrimonial home should be English, is, in the mouth of a lawyer, identical with the condition that the husband should be domiciled in England. In the eye of the law, home is domicil and domicil is home. The difficulty of defining the legal phrase is only equalled by the notorious impossibility of translating the colloquial one; but to show that the legal conception of *domicil* is theoretically and actually the colloquial conception of *home* draped in legal robes, a few of the most successful attempts to define the former term may here be given.

"Domicil is the legal conception of residence, and the two words differ no otherwise than, as in all sciences, common words, on becoming technical, are limited in meaning for the sake of precision."—(Westlake, sec. 30.)

"By the term domicil in its ordinary acceptation is meant the place where a person lives and has his home. In a strict and legal sense that is properly the domicil of a

\* At p. 9 (L.R., 4 P.D.). It is worth while observing that James, L.J., goes on to add a further test, and one, as far as I know, never before demanded by an English Court, though it has been suggested in America (*Story*, sec. 229 and (n)). He adds, "and where . . . the wrong is done here." Surely there can be no doubt that a domiciled Englishman could obtain a divorce here on the ground of adultery committed by his wife in France!

person where he has his true fixed home and principal establishment.”—(Story, Confl., p. 37.)

“ Two things must concur to constitute domicil ; first, residence ; and secondly, the intention of making it the home of the party.”—(Story, Confl., p. 37.)

“ Domicil is a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.”—(Phillimore, Law Dom., p. 13.)

“ Domicil is the place where a man would be if there were no particular circumstance to determine his position in some other place at that period.”—(Per Lord Loughborough in *Bempde v. Johnstone*, 3 Ves. jun., 202.)

“ Domicil of Choice” (*i.e.*, as opposed to domicil of origin) “ is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. . . . There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office.”—(Per Lord Westbury in *Udny v. Udny*, L.R. 1, H.L. Sc. 458.)

The above citations seem sufficient to establish the proposition that *domicil* is the legal equivalent of the colloquial *home*. It would be difficult, at any rate, to select language more fitted to support such an argument. It may not be superfluous to subjoin, in illustration of the same truth, the well-known description of domicil which is so often borrowed from the Roman Law. “ *In eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit ; unde rursus non sit discessurus, si nihil avocet ; unde cum profectus est, peregrinari videtur ; quo si rediit, peregrinari jam destitit.*”—(Cod. X., 39, 40.)

It only remains, in order to apply the above explanation of the meaning of *domicil* to the present case, to enquire how, why, and to what extent, the general rule is modified in the case of consuls. The secret of such modification is

to be found in the judgment of Lord Westbury in *Udny v. Udny*, quoted above. The residence or home which the law translates into domicile must be "freely chosen, and not prescribed or dictated by . . . the duties of office." If the person whose condition is being inquired into has a quasi-residence or home which is prescribed by such an external necessity as the duties of an office (consular, for example), the law refuses to draw the conclusion or inference of domicile from such compulsory quasi-residence. It continues to attribute to him the domicile which he had before and apart from such quasi-residence; and from this attribute it draws the inevitable inference that the place of such former domicile is his natural and continuing home, though he is temporarily severed from it. Thither it expects him to return and take up his permanent abode,\* so soon as the external necessity which binds him to foreign soil is removed. If it did not expect this, the law would in truth and in substance regard him as domiciled in his new abode; but it is a legal principle *that this inference of new domicile shall never be drawn from compulsory official residence alone.*

That this is the true *rationale* of the rule as to consular† domicile appears from the following considerations. A consul is only regarded as domiciled in the country which he represents, in cases where he had that domicile before his appointment. If a British consulate, for example, is accepted by a person already domiciled abroad, who thereupon undertakes to represent the British government in the country of his own domicile, he does not thereby lose his domicile of origin and acquire a domicile in England. Nor

\* See the language of Lord Loughborough in *Bempde v. Johnstone*, already cited.

† The doctrine as to ambassadors is governed by different considerations. By the theory of *exterritorialité*, the house of an ambassador is part of his sovereign's territory, and residence there is consequently not residence abroad, but in the country which he represents.

would an Englishman, who accepted the French consulate which M. Niboyet held at Newcastle, acquired a French domicile by so doing.\* The domicile of a consul, in short, does not depend upon his official relationship to a particular country, except so far as that relationship determines the voluntary and permanent nature, or the contrary, of his residence or dwelling. If the official relationship does not interfere with the residence, the domicile remains unchanged. If it compels a new residence, such residence is not regarded as voluntary or permanent, and the domicile is again unaffected. Such quasi-residence does not constitute *home*.

To sum up the preceding argument, it has been shown that domicile is the legal equivalent of the colloquial home, and the only determinate form in which the law can recognise that intangible and ill-defined conception. The admitted fact, therefore, in *Niboyet v. Niboyet*, that the husband was domiciled in France, involved necessarily and peremptorily the conclusion that his *home*—*i.e.*, the “matrimonial home”—was in France also, and that his so-called “residence” in England was in its nature temporary, compulsory, and devoid of legal value. It follows therefore that it is immaterial whether the condition of jurisdiction is verbally expressed as “matrimonial home in England” or “domicil in England;” because neither of these conditions (in reality one and the same) was fulfilled in the case under discussion.

It only remains to point out some of the inconveniences and difficulties which would result from the distinction between *home* and *domicil* which James, L.J., draws. The question of domicile, as the Lord Justice remarks, has often been found very difficult of solution. Whether regarded as an issue of law or of fact, it is one which involves a lengthened inquiry, a careful balance of minute particulars, a

\* *Sharpe v. Crispin*, L.R. 1 P. & D. 611. *Heath v. Samson*, 14 Beav. 441.

judicial determination of the most delicate kind. Will these difficulties be lessened or increased, when Courts are called upon to discriminate, not between domicil and non-domicil *simpliciter*, but between these and a third or intermediate conception called *home*, less than one and greater than the other, as difficult of definition and as elusive of the grasp as that which it is intended to supersede? Remembering the definitions of domicil which have been given above, what attributes are there left with which the new legal conception of *home* is to be endowed? What means can be suggested of equipping it, except by robbing the existent legal conception of *domicil* of all the essential qualities which give it a practical and effectual being, leaving the empty shell or name for the complicated jural code of existing international law to operate upon? What else has been done, indeed, in the present instance? The Court of Appeal find a person cited before them who ought, according to their view, to be regarded as domiciled in England, and who probably was so in fact. It is, however, admitted on the pleadings that his domicil is French—the admission being, no doubt, partly due to the effect of a well-established legal presumption. Unable to deny the existence of the legal presumption, or to ignore the effect of the admission, the Court of Appeal reconcile their inclination with the facts in the following way. “The petitioner,” they say in effect, “is living in England, but is domiciled, by law and by the admission of the parties, in France. Be it so. We will verbally admit the French domicil, but we will not allow it to have its usual consequences. The kernel of domicil is home—permanent residence. In this case the admission makes the shell—the domicil—French, but says nothing at all about the home—the kernel. We will, therefore, confine the effect of the admission and of the rule of law to the *domicil*, which we will make an empty phrase, without colour, meaning, or practical effect; and we will hold that the *home* which constitutes its colour and

meaning are English. The name of the thing shall be French, as we are impotent to alter it ; but the thing itself we will treat as English ; which will be sufficient for our purpose, because *where and while the matrimonial home is English*, and the wrong is done here, *the English jurisdiction exists.*"

J. ALDERSON FOOTE.

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## V. — THE PROPOSED EXTENSION OF COUNTY COURT JURISDICTION.

A NEW departure in legal reform is about to be undertaken with the object of appeasing the discontent which prevails regarding the dilatory administration of justice in the Superior Courts. In order to expedite the dispatch of judicial business, the Lord Chancellor has introduced a Bill whereby he hopes to divert into new channels all causes of minor moment. According to the proposed measure, the County Courts, with extended jurisdiction, are to be the receptacle for this class of litigation. Before, however, entering upon a discussion of the Bill, it may not be unimportant to trace the development of those inferior tribunals.

Without dwelling upon the origin, expansion, and decline of the ancient *shire-moot*, the historic progenitor of the existing County Courts, we pass at once to the real foundation of their modern jurisdiction, the 9 & 10 Vict., c. 95, "An Act for the more easy recovery of small debts and demands." By this Statute, County Courts were re-constituted, and jurisdiction conferred upon them in personal actions where the debt or damage claimed was not more than £20, except in ejectment, or where the title to any



corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, was in dispute, or where the validity of any devise, bequest, or limitation under a will or settlement was in question, or where the action was for malicious prosecution, or for libel or slander, *crim. con.*, seduction, or breach of promise of marriage. By Sec. 122\* of the same Act, jurisdiction was given for the recovery of possession of tenements where the value or rent of the premises did not exceed £50 annually. The Act of 1852 (13 & 14 Vict., c. 61, s. 1) raised the jurisdiction of County Courts for the recovery of debt, damage or demand, from £20 to £50. Sec. 24 of the 19 & 20 Vict., c. 108, still further extended the operation of the previous Act by permitting the Court to have jurisdiction where the claim had been reduced by set off to £50. Under Sec. 23 of the same Act the parties might, by consent in writing, render the County Court capable of entertaining any action whatever which might be brought in a Superior Court of Common Law (not of Equity) save an action for *crim. con.*† The County Courts Act of 1867 (30 & 31 Vict., c. 142, ss. 11 & 12) enabled actions of ejectment, and those in which the title was in question, to be brought in a County Court where neither the annual rent nor value of the property exceeded £20 per annum, but the defendant might apply by summons at Chambers to remove such action into a Superior Court where the title to lands or hereditaments of greater annual value would be affected by the decision in the County Court. By a previous Act (19 & 20 Vict., c. 108, s. 26) a Judge of a Superior Court had power on application of either party, in an action of contract for a sum not exceeding £50, on terms *after issue joined*, to send the issue for trial to a County Court, and by Sec. 7 of the Act of 1867, a Judge might, *before issue joined*, remit such action, unless good cause was shown to the contrary. So too in an action for malicious prosecution,

\* Repealed, but virtually re-enacted by Sec. 50 of 19 & 20 Vict., c. 108.

† This action was abolished by 20 & 21 Vict., c. 85.

illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, irrespective of the damages claimed, a Judge of the Superior Court might, on the defendant's application, unless the plaintiff gave security for costs or satisfied him that it was a fit action to be tried in a Superior Court, transfer it to the County Court (Sec. 10 of 30 & 31 Vict., c. 142).

In the years 1865 and 1867, the 28 & 29 Vict., c. 99, and 30 & 31 Vict., c. 142, conferred upon the County Courts the principal portion of their equitable jurisdiction. These Statutes enabled the County Courts to exercise all the power and authority of the Court of Chancery where the value of the property claimed, or the amount in dispute, did not exceed £500, in administration suits, suits for the execution of trusts, partition, foreclosure, or redemption, enforcing any charge or lien, specific performance, reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of property, and the dissolution and winding-up of partnerships; and in proceedings under the Trustee Relief or Trustee Act, or relating to the maintenance or advancement of infants, or for orders in the nature of injunctions requisite for the granting of relief in the above cases, or for a stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the Court to which application for the order to stay proceedings was made. The County Court also derived equity jurisdiction from other Acts, such as the Charitable Trusts Acts of 1853 and 1860;\* and Sec. 8 of 30 & 31 Vict., c. 142, empowered a Judge of the Court of Chancery to transmit any suit or proceeding, which might have been commenced in such superior Court to the County Court, upon the application of either party or without such application. In 1868 the 31 & 32 Vict., c. 71, invested County Courts with Admiralty jurisdiction, and this jurisdiction was enlarged

\* 16 & 17 Vict., c. 137, s. 32; 23 & 24 Vict., c. 136, s. 11; also, 17 & 18 Vict., c. 112; 18 & 19 Vict., c. 63; and 25 & 26 Vict., c. 87.

by the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict., c. 51). During the same Session, Parliament conferred upon these Courts unlimited jurisdiction in Bankruptcy (32 & 33 Vict., c. 71).

In particularizing the variety of matters in which the County Courts were empowered to administer justice, numerous Statutes still remain to be noticed; of these a bare mention must suffice. Of measures passed in 1874 may be cited the Building Societies Act, the Alkali Act, the Married Women's Property Amendment Act, the Infants' Relief Act, the Attorneys and Solicitors Act, the Vendor and Purchasers Act, the Intestates' Widows and Children Act. Of the measures passed in 1875, which more or less intimately concern the County Courts, reference may be made to the Public Health Act, the Friendly Societies Act, the Sale of Food and Drugs Act, the Land Transfer Act, the Employers and Workmen Act, and the Copyright of Designs Act.

The Legislature has protected the jurisdiction of County Courts by enacting that, where an action might have been commenced in the County Court, the plaintiff shall be deprived of his costs in the Superior Court, unless he recover more than £20 in contract or £10 in tort, except the Judge otherwise certify (Sec. 5 of 30 & 31 Vict., c. 142). This proviso was restricted to Common Law actions, but by Sec. 67 of the Judicature Act, 1873, it has been rendered applicable to all actions commenced or pending in the High Court of Justice, in which any relief is sought which is obtainable in the County Court.\*

To assist those who are unfamiliar with County Court practice and procedure in arriving at their own conclusions respecting the proposed scheme, it has been deemed expedient to indicate thus far the course of previous legislation.

No less than three Bills altering the jurisdiction and procedure of County Courts were introduced in the House

\* See *Parsons v. Tinling*, L.R. 2 C.P.D. 119, approved in *Garnett v. Bradley*, L.R. 3 H.L. (E.) 944.

of Commons in 1878. These were referred to a Select Committee, which sat for seventeen days and examined upwards of thirty witnesses, among whom were Lord Justice Bramwell, and many County Court Judges and Registrars. The Report recommends an extension of jurisdiction in Common Law matters up to £200, but the Committee are unfavourable to any extension of jurisdiction in Equity. The average number of Equity cases tried throughout the year was eleven to each circuit, a circumstance which in itself proves the Act of 1865 to have been a failure. The Committee consider it desirable to permit actions for malicious prosecution to be brought in the County Courts, as they closely border on those for false imprisonment now dealt with by these tribunals. The Report deprecates any increase of jurisdiction protected by costs; it recommends that the salaries of the Judges should be raised to £2,000 per annum, with a pension of two-thirds of their salaries after twenty years' service, and condemns the present system which allows Registrars to practise as solicitors.

Mr. Norwood and Mr. Cowen have again this Session presented Bills to extend the jurisdiction of the County Court. The measure of the former is a mere reproduction of the suggestions of last year's Committee, but the Bill of the member for Newcastle is far more ambitious. In accordance with the recommendations of the Judicature Commission, it proposes to constitute County Courts branches of the High Court; to confer upon them unlimited jurisdiction, subject to the defendant's right to object to the jurisdiction in claims above £200 on the Common Law side and £2,000 in Equity; and to apply to the inferior tribunals the practice under the Judicature Acts wherever the amount claimed exceeds the present limit. Now, however, that the Government has taken up the matter, there is little likelihood of either of these measures being crystallized into law, and detailed criticism of them therefore seems unnecessary.

It will be observed that the Government adopts the recommendation of last year's Committee in more than one important particular. The first two Sections of the Bill raise the jurisdiction of County Courts in actions of contract and tort, and for the recovery of *small* tenements on the expiration of leases, and upon forfeiture for non-payment of rent, from £50 to £200. The jurisdiction in ejectment, and in cases where the title to corporeal or incorporeal hereditaments comes in question, is increased by Sec. 3 from £20 to £40. In direct conflict with the Report, however, the 4th Section extends the equitable jurisdiction from the present limit of £500 to £1,000, and further, it is proposed by Sec. 5, to invest the County Court with all the power and authority of the Chancery Division of the High Court of Justice, to relieve against fraud or mistake, to enforce a charge on a married woman's separate estate, subject to a general limit of £1,000 in respect of the damage, estate, fund, or debt.

Not without design did the Select Committee of last Session notify its disapproval of any further development of jurisdiction in Equity. According to the latest returns there were, in all the County Courts in England, during 1877, only 613 equitable proceedings, as against 655 in 1876. These results can hardly be deemed satisfactory when it is borne in mind that equitable jurisdiction was conferred upon County Courts in 1865. The paucity of Equity plaints has been accounted for by the fact that the majority of the County Court Judges are Common Law lawyers, inexperienced in the application of Equitable doctrines, and that the Registrars possess no technical knowledge of Chancery practice. Already, in the multifariousness of their duties, the latter would bear comparison with Maître Jacques, in Molière's *L'Avare*, who performed the functions of cook and coachman, and when summoned, desired to know in which capacity he was required, and in which dress he was to appear.

With some show of reason has it been surmised that suitors will probably not display any great eagerness to avail themselves of the facilities for the cheap and speedy justice which the first five Sections of the Bill are supposed to afford. In other words the Government entertains a well-grounded suspicion that people may still prefer to have their differences adjusted by a superior tribunal, notwithstanding its alleged disadvantages and drawbacks. In anticipation of such a contingency, Sec. 6 proposes that whenever an action is commenced or petition filed in the High Court of Justice, which could, under any of the Statutes, have been brought in a County Court, the High Court may deprive the plaintiff of three-fifths of his taxed costs, exclusive of disbursements. This penalty is rendered enforceable at the discretion of a Judge or Master in those cases only where he is of opinion "that there was no question of fact or law to be tried or decided of sufficient importance or difficulty to warrant the action being brought in the High Court."

Sec. 5 of the Act of 1867, to which attention has already been directed, affords a precedent for the proposed proviso. The new clause, however, in relaxing the present rule, seems to be an improvement on it, for whereas now, the plaintiff is absolutely deprived of all his costs, by the new clause it will be possible to mulct him of a certain proportion only and under special circumstances. On the other hand there are considerations which should operate in securing its withdrawal or rejection. No pressure of business in the High Court affords a pretext for relegating any portion of the work to inferior tribunals. If the Judges are unable to cope with the arrears, it would be the falsest parsimony not to add to their numbers. To dictate to a man the tribunal he shall choose is pure despotism at a time when we have the Lord Chancellor's assurance that there is no block in the Superior Courts. In bringing in the Bill under discussion, Earl Cairns announced that "the

number of cases ripe for hearing in the Court of Chancery at the commencement of the present year was somewhat less than at the commencement of the preceding one. In January, 1878, there were 528 cases for hearing; in January, 1879, there were only 512; many of these cases have been heard and there is *no arrear in the Court of Chancery*. As to civil business in London and Middlesex: on the 11th January, 1878, there were 1,164 causes ready for trial as against 957 on the corresponding day of the present year. On February 17th last, there were 843 causes awaiting trial, and these will be got through by July in addition to any new ones which may arise in the meantime." Remembering that two judges were, by an exceptional circumstance—the Royal Commission on the Criminal Code Bill—prevented from attending to their ordinary duties, that a new Judge of the Bankruptcy Court is to be appointed, who will be expected to find time to sit in other divisions of the High Court besides his own, and that an economy of judicial strength in the constitution of Courts *in banc* has been resorted to, there seems not the slightest foundation for apprehension that the Judges of the Superior Courts will be unable to grapple efficiently with the cause lists.

The magnitude of the issues at stake, and the intricacy of the legal principles applicable thereto, are in no sense dependent upon the sum in dispute, and it is, therefore, impolitic to hamper the suitor in the selection of his tribunal by the imposition of a money test. Confusion will also arise from the divergent views entertained by those entrusted with the adjustment of costs as to the necessity for proceeding in the Superior Courts. For those, too, unendowed with the power of divination, it will be impossible to foretell whether, during the progress of an action, "questions of law or fact of sufficient difficulty and importance" may or may not arise which would render a trial in a Superior Court expedient. By imperilling their costs the clause proposed will coerce plaintiffs into County



Courts, when their actions ought fairly to be tried at the Assizes or in London, or it will compel them to seek refuge in an alternative, which, on account of the expense and loss of time it entails, is perhaps equally unpopular—a reference. On this ground the Attorney-General opposed a similar proviso in Mr. Cowen's Bill of last year. His words were: "In my opinion people ought not to be driven into the County Court, but they should be allowed to go there if they desire to do so;" that is, he would give the County Court an optional or voluntary concurrent jurisdiction with the High Court, but not an exclusive jurisdiction. Another argument against the proposal before us is that, by the Judicature Act of 1875, Order LV., Rule 1, the costs are left almost universally in the discretion of the Court, and therefore it is unnecessary to revert to this prohibitive policy. These were in all probability among the reasons which induced the Select Committee of last Session, and the Incorporated Law Society in their petition lately presented to Parliament, to express themselves as strongly opposed to any extension of the principle of protecting the County Court Jurisdiction by deprivation of costs.

It is proposed, by Sec. 7 of the Bill, to confer upon County Courts unlimited concurrent jurisdiction with that of the High Court, but where the limits imposed by the first five Sections of the Bill are exceeded, "such action or petition shall be removed into the said High Court by writ of *certiorari* or otherwise, as may be prescribed by the rules of the High Court, upon the application of the defendant to the action or the party opposed to the petitioner." Existing legislation has accorded far more extensive powers for removal than that now suggested,\* and, as already indicated, the County Courts at present possess,

\* Either party may, by leave of a Judge of a Superior Court, and upon terms, remove a plaint into the High Court, no matter how small the amount in dispute (19 & 20 Vict., c. 108, s. 38; 9 & 10 Vict., c. 95, s. 90, and 13 & 14 Vict., c. 61, s. 16; 28 & 29 Vict., c. 99, s. 3. Judicature Act, 1873, s. 90).



by consent of the parties, unlimited concurrent jurisdiction with the High Court. It is, therefore, difficult to discover the precise advantages to be reaped by an alteration of the law in that particular. The witnesses examined by the Select Committee of last Session, unanimously testified to the fact that jurisdiction by consent is a privilege rarely exercised. For this moribund jurisdiction it is proposed to substitute that detailed in Sec. 7, but to what purpose? There is nothing to warrant the conclusion that suitors will more frequently avail themselves of the new than of the present proviso. On the contrary, the evidence, if anything, points the other way, and the consequence of the contemplated change will be that whilst at present the parties can mutually agree to accept the County Court as their tribunal, in future the plaintiff will be at liberty to inflict upon the defendant the additional trouble and expense of removing his case to a Superior Court. The Section as it stands is open to the further objection that the High Court is to prescribe the rules for the removal of the cause from the County Court. The growing tendency of late years to legislate by rules of Court is one that should be discouraged, firstly, because Parliament thereby delegates its authority, and, at the same time, shifts the responsibility on to the shoulders of the Judges, and, secondly, because rules create uncertainty and multiply judicial decisions. The faulty method at present employed for their promulgation is not unfrequently attended with inconvenience and annoyance. Only the other day, both Bench and Bar were placed in a state of perplexity by reason of the issuing of a new rule under the Judicature Act. It appeared that this new rule had not been communicated even to the learned Judges, and the Lord Chief Baron commented strongly on the circumstance, expressing his surprise and regret, that when orders were framed by a limited meeting of the Judges, means should not be adopted to have copies of them delivered at once to all the members

of the Bench, and to have them made public, so that the Bar and suitors might also become aware of them. Nothing has a greater tendency to bring the law into contempt than its instability. The reversal of judicial decisions is, perhaps, a drawback incidental to every legal system, but it is the duty of the Legislature to avoid in every possible way whatever might render the law still more unsettled. Parliament when giving power to make rules of Court ought at least to require them to be laid on the tables of both Houses for a specified time prior to publication. Under the proposed Section the rules of Court may, and probably will, be framed in the same spirit as the Bill, in which event the defendant's right to remove his case will be further abridged, and the exclusive jurisdiction will assume still larger proportions.

Sec. 8 permits actions or proceedings pending in the High Court, which might have been commenced or taken in the County Court, except under the unlimited jurisdiction clause, to be transferred at any time to the County Court, on the application of either party to a Judge of the High Court, *or without such application*. This provision is designed to supersede the present system of remittal previously mentioned (regulated by 19 & 20 Vict., c. 108, s. 26; 30 & 31 Vict., c. 142, ss. 7 and 8); but, strangely enough, Sec. 10 of the last cited Statute, whereby actions of tort of unlimited amount may, on the defendant's application, be transferred to the County Court, is left unrepealed. The discretion which this clause purports to vest in the Chief Clerks and Masters is about as vague and extensive as it well could be. If, as has been asserted, two-thirds of the actions brought at Common Law involve amounts not exceeding £200, these functionaries will be enabled to decimate the cause lists without let or hindrance. The uncertainty as to the place and mode of trial, which such a rule may create, will be a very great hardship on many honest litigants. Under the ægis of this accommodating

section, a plaintiff who, in the preliminary stages of the action, has availed himself of the speed and economy of the High Court, may, when the result begins to appear uncertain, face his opponent with cheapness and comfort before the inferior tribunal. A defendant who cannot afford to disclose his defence on the pleadings may, immediately after writ issued, remove the case to the County Court, where he can resist a just claim with greater chance of success.

Sir Henry Thring and his coadjutors must have laboured under the impression that the maxim *mala grammatica non vitiat chartam* applied with equal force to Statutes, or they would have penned the 9th Section of the Bill less hastily. As a specimen of careless draftsmanship it deserves quotation *in extenso* :—

“Whenever any party to an action in a County Court considers that the Court in which the action is commenced is inconveniently situate for the attendance of counsel or solicitors, it shall be lawful for such party to require, in manner to be prescribed by rules of Court, the action to be tried in a Court in which legal assistance can be less expensively obtained, and which is presided over by a Judge of the Court in which the action has been commenced; provided that if the Judge is of opinion that the expense of the action has been increased by its trial in such Court he shall direct the increased cost *the other party may have been put to thereby* to be paid by the party at whose instance the action was transferred to such Court, *and deducted from the other party*, whether he obtains a verdict or not.”

The precise manner in which “the increased cost is to be deducted from the other party,” is left to conjecture. Are the Judge’s instructions to be carried out Shylock-fashion, or how otherwise? Altogether, this Section bears the strongest internal evidence of having escaped the scrutiny of the Lord Chancellor, for he, whose language is “a well of English undefiled,” could never have allowed

such a clumsy piece of workmanship to pass muster. Not to dwell upon mere verbal ambiguities and inaccuracies however, it would seem that the authors of the Bill have overlooked Section 22 of 19 and 20 Vict., c. 108, which effects the very object aimed at by the clause. It enacts that "if a Judge of a County Court shall be satisfied by either party to a cause pending in his Court that such cause can be more conveniently or fairly tried in some other County Court, he shall order that the venue be changed, and that the cause be sent for hearing to such other Court, &c."\*

Were it to pass in its present form, the proposed Section would be productive of embarrassment and injustice. It would place in the hands of either party an absolute power to remove the action which, if exercised capriciously, might be seriously detrimental to his opponent. Besides, if the place of trial be changed for good cause, would it not be inequitable, nay, unreasonable, to condemn in costs the party who justifiably altered it?

The only other proviso to be noticed in connection with the extension of County Court jurisdiction is Sec. 14. Its purpose is not far to seek. It is a covert blow, aimed at the local and inferior Courts about the country to conduce to an accession of business in the County Court. Having endeavoured to fence round the County Court with safeguards against the competition of the Superior Courts, the framers of the Bill resort to a somewhat similar device in reference to the Mayor's Court, the Liverpool Court of Passage, the Hundred Court of Salford, the Court of Chancery of Lancaster, the Court of Pleas of Durham, &c. The Section proposes that when not more than £20 in contract, or £10 in tort, shall be recovered in any Court other than the High Court of Justice, the plaintiff shall only recover County Court costs, any Act to the contrary notwithstanding. Suppose, however, that the action was one that

\* For change of venue when the Judge or Registrar is an interested party, see continuation of this Section, also ss. 19, 20 and 21 of the same Act.

could not have been brought in the County Court, is the plaintiff, if he recovers less than the specified amount, to be mulcted of a portion of his costs? This *casus omissus* would not arise if matters were permitted to remain in *statu quo*. Sec. 29 of 30 & 31 Vict., c. 142, which it is now sought to repeal, allows County Court costs only where the plaintiff recovers less than £10 in any Court other than a Superior Court, *unless the Judge certified that the action or suit was a fit one to be brought in such local or inferior Court*. If it be deemed necessary or expedient to extend the principle of the clause to be repealed, a proviso, analogous to the one just quoted, ought to be incorporated in the superseding Section.

The remaining Sections of the Bill may be dismissed in a very few words. The solitary instance of an attempt to alter the procedure of the County Courts is represented by Sec. 10, which reduces the time for entering an appearance, after service of summons for judgment by default, from sixteen to eight days, thus assimilating the time for judgment by default in the County Court with that in the Superior Court. Sec. 11 permits damages awarded to an infant to be invested for his benefit. Sec. 12 empowers the Lord Chancellor, on the death of a Judge, who has not appointed a deputy, to appoint a barrister, of seven years' standing, to act as Judge for a period not exceeding three months. By Sec. 13 the Lord Chancellor may, under certain circumstances, permit a Registrar to reside out of the district of a County Court. It is a pity that this last clause did not go farther, and interdict him from practising as a solicitor, at all events within his own district. The schedule to the Bill proposes to remove claims for malicious prosecution from the category of prohibited actions, in accordance with the recommendation of the last Select Committee, and to repeal, in addition to the Sections already mentioned, all clauses in existence enabling the making of rules and orders, except the power to make

rules and orders under the Act of 1856, and the power to frame scales of costs under Sec. 8 of the Act of 1875.

The County Courts, as we have seen, were created for the recovery of small debts and demands, and their constitution and procedure partook of that character. Notwithstanding the considerable extensions of their jurisdiction, which have from time to time been made, the original characteristics of those Courts remain unaltered. The vast majority of cases that come before them are claims for sums far below the present limitation. According to the latest judicial statistics the average amount of each plaint entered was £3. 4s. 11d., and according to a return obtained by Mr. Norwood in 1876, it appeared that in 1875 out of 894,000 plaints, upwards of 877,000 were for sums below £20. Since 1865, there has been a tentative process of what may be termed a voluntary jurisdiction between £20 and £50, but according to the official returns the resort to this has been little more than nominal. When, for instance, we find 297 only out of 16,000 claims in one district exceed £20, the experiment proclaims its own fiasco. Why then, it will be asked, did the last Select Committee recommend an extension of jurisdiction? In all probability, because the County Court Judges and their Registrars were in favour of it. A further question then arises, viz., whether evidence proceeding from such a source ought not to be received with great caution? Is not the love of power, innate in every human breast, coupled with a consequent elevation of status and a prospect of increased remuneration, calculated unconsciously to bias the judgment of the most conscientious of men? Are not these incentives sufficient to induce a man to look approvingly on the proposition submitted to him? As Judges in their own cause, the evidence of these witnesses should be admitted with considerable reservations.

In leaving untouched the existing procedure, the Bill before us raises two presumptions. One is, that the machinery of

County Courts is in a satisfactory condition; the other, that no change is needed to adapt it to the new order of things. That neither of these propositions accords with the fact, the following details will readily demonstrate.

The founders of the modern County Courts started with a procedure which can only be called paternal. Suitors they treated as children inexperienced in the ways of the world. With fatherly forethought they protected litigants from the dangerous influence of solicitors by placing the legal business under the supreme control and management of the Court officials, who, with an eye to their own interests, charged very high fees and allowed very low costs. No plaintiff could be permitted to serve his own summons on the defendant, nor to procure the attendance of his witnesses; neither party was free to pay or receive money to or from the other; and in every case, however trivial, a trial had to be held. As time wore on, vast improvements were introduced into the procedure of the Superior Courts, but the wave of progress made few incursions on these inferior tribunals; they profited little from the good example set them. Truly, the parental procedure has been somewhat relaxed, and here and there a breach has been effected in it, but the moving spirit still survives, and reluctantly gives way only after adding some proviso of restraint to every movement of reform.

It was not until 1867 that the power of issuing a summons, upon which judgment could be obtained in default of defence, and thus, without a compulsory trial, was grudgingly granted to plaintiffs in respect of trade debts. This privilege was somewhat extended by Sec. 1 of the Act of 1875, but as usual with harassing restrictions. The debt sued for must be either for the price, or value, or hire of goods to be dealt with or used in the way of trade, or the amount must exceed £5, unless the Registrar give leave.\* In ordinary cases the plaintiff has not yet been

\* County Court Rules, 1875, Order IV., Rule 5.

trusted with the responsibility of serving his own summons. The Registrar issues it to the bailiff, by whom it has to be served,\* and the same rule holds good as regards default summonses, unless the solicitor to the plaintiff states in writing at the time of entering the plaint, that he wishes to serve the default summons either by himself, his clerk, or servant in his permanent exclusive employ.† In that event an affidavit of service must be filed, together with a copy of the summons.‡ What reason can be assigned for refusing the parties liberty to serve their own process according to the practice in the Superior Courts, except to keep as much as possible of the process serving in the hands of the bailiffs? Affidavits are now being freely used in County Courts for proof of debt and of service. And why could not a plaintiff file an affidavit and take out a summons, as well as in the High Court, under Order XIV., and with the same result? The present practice of judgment by default is as unfair to creditors as it is favourable to debtors.

The necessity in many cases for proceeding against a debtor in his own locality, however distant, and the obligation to take witnesses to that district to prove the case, inflict serious inconvenience and expense on the mercantile community. It has been suggested that, in cases where mercantile houses employ travellers, the plaintiff ought to be allowed costs of conveyance to and from the defendant's district. This plan would mitigate the evil, but the true remedy is to be found in the adoption of Order XXXVI., Rule 1, of the Judicature Act, whereby local venues are abolished in actions brought in the superior Courts. Should the present Bill become law, it will greatly cripple the operation of this salutary regulation.

Adequate facilities for trying contested cases are at present entirely absent in County Court practice. Disputed

\* County Court Rules, 1875, Order II., Rule 20; Order VIII., Rule 25.

† County Court Rules, 1875, Order IV., Rule 6.

‡ County Court Rules, 1875, Order IV., Rule 7.



actions need a tribunal of something like weight and authority, always accessible for interlocutory applications. To administer interrogatories, or to get further particulars, application to a Judge is absolutely imperative. It is practically impossible for parties in a County Court to discover by interrogatories and inspection of books and documents what the real issues are. The County Court Judges attempted, by the Consolidated Orders of 1875, to give interrogatories, inspection, and discovery; but the provisions have been found to work so inefficaciously, that the practice is never resorted to. With regard to interrogatories, for example, the plaintiff or defendant may, under the Consolidated Orders, administer them; but leave must previously be obtained from the Registrar, and the application must be supported by an affidavit, which the applicant is required to file. Such affidavit must be made by himself and his solicitor or agent, or, *by leave* of the Registrar, by his solicitor or agent only, stating that the deponent believes that material benefit will be derived in the action from the discovery he seeks, and that there is a good cause of action or defence on the merits.\* On administering interrogatories to the other side in the County Court, the opposite party answers, or refuses to answer, at his peril; there is no order made by the Judge, as there is in the Superior Court, that the interrogatories shall be answered, and when the cause comes to be tried, if the party has not answered them, the Judge may adjourn the case if he thinks that they ought to have been answered, or he may, if he chooses, order it to proceed; so that both parties go to trial without

\* County Court Rules, 1875, Order XIII., Rule 6. Compare Order XXXI., Rule 1, of Judicature Act, 1875, which enables the plaintiff, at the time of delivering his Statement of Claim, and the defendant at the time of delivering his Statement of Defence, or at any subsequent time not later than the close of the pleadings, to deliver interrogatories to the opposite party, without any order for the purpose. The County Courts have thrown still greater difficulties in the way of the party seeking discovery, by rendering the intervention of the Registrar and bailiff indispensable.

being able to form the least opinion of what is going to happen. The same thing is true of what is done by the County Court Judges with regard to the production of documents, their inspection and discovery, and yet the success of a trial constantly depends upon a thorough scrutiny of an adversary's documents. In anything like real litigation it is utterly impracticable to take a cause to issue without such information.

The want of pleadings is an equal disadvantage in the County Courts: there, none exist, nor is there a formal joinder of issue;\* but the defendant, who intends to rely on an equitable or statutory defence, or to set up a counter-claim, or plea of set-off, infancy, coverture, Statute of Limitations, discharge under the Bankruptcy Act, tender, truth to a libel or apology, must give notice to the Registrar of the Court, who communicates the same to the plaintiff.† The usefulness of pleading is that it enables the parties to know to a certainty the point that is going to be raised, or in other words, it compels each side to apprise the other of what it is he intends to controvert, not for the purpose of giving information, but that he may be tied down to the case as it presents itself on the pleadings. There is also another advantage; if particulars of demand only are obtainable, a cause can never be determined upon demurrer. All the points of law and every conceivable fact remain in dispute. An extension of jurisdiction, founded upon the Lord Chancellor's Bill, would place litigants in a more sorry plight than they were in the Superior Courts in the old days of what were called "general issues." At the present time, when the system of pleading has been developed with so much care and elaboration, this retrogressive movement—this recurrence to a faulty and obsolete procedure—coming as it does from a quarter whence it might

\* 9 & 10 Vict., c. 95, s. 74.

† *Ibid.*, s. 76; Order IX., Rules 1—16; Order XX., Rule 4.

least have been expected, fills us with amazement and dismay.

The Consolidated Rules have conferred upon litigants the long-yearned-for privilege of summoning their own witnesses without leave of the Court.\* Such summonses though, must be obtained at the office of the Court, and for the service of them, the bailiff's interposition is deemed obligatory, unless the Judge or Registrar sees fit to delegate the duty to the party or his solicitor, or to some person in the permanent or exclusive employ of either. No mere stranger is permitted to take upon himself this responsible office.

More fortunate than their brethren of the common juries, from whose ranks they are selected, the jurymen of the County Court receive remuneration at the rate of one shilling a piece for each verdict returned by them.† Jurymen, however, are never summoned unless one of the parties desires to submit the issue to their decision, and as that which is left to people's option is seldom adopted if they have to take some active steps, jury cases in the County Court are like angels' visits—few and far between. There is yet another reason why trial by jury in the County Court is the exception rather than the rule. To speak plainly, some of the County Court Judges discountenance the practice on account of the extra amount of time it occupies, whilst others regard it as a want of confidence in their capacity or integrity. It would be inopportune here to enter upon a defence of the jury system, but as we are upon the subject, it is worth while noting Lord Justice Bramwell's reply to a question from the Chairman of the Select Committee of last Session. "I think," said he, "the jury system popularises the law; there is one good thing about them, namely, that they are the true Court of Equity; they mitigate the rigour of the law by going wrong every now and then. A man must have

\* Order XIV., Rule 1.

† 9 & 10 Vict., c. 95, s. 71.

a good case, either in point of law or in point of merits, to face a jury ; he cannot go before it without something of one or the other." No satisfactory argument has ever been adduced for fixing the number of a County Court jury at five instead of at twelve, and it will be a gratuitous innovation not to concede to the parties the right to a special jury under an extended jurisdiction.

One of the worst features of the County Court system is the arbitrary restrictions it places on the power of appeal. In cases under £20 no appeal lies save by leave of the Judge. When granting such leave, he not unfrequently imposes terms which inflict unwarrantable hardship on the successful appellant. As an illustration of the way in which the *appellationis saluberrimum remedium* is fettered, the case of *Cooper v. The London and Brighton Railway*\* may be cited. In that action, the point arose whether, under the circumstances, the holder of a season ticket, who had broken one of the conditions on which it was issued, could recover the sum of ten shillings deposited by him as security for the due performance of his contract. The plaintiff succeeded in the Court below, and the County Court Judge refused leave to appeal unless the defendants agreed to pay all the costs in any event. No choice was left to them but to accede to this unreasonable demand, or forfeit all chance of establishing their right. They accordingly complied with the learned Judge's requisition, and on appeal to the Exchequer Division of the High Court, his decision was reversed. Now, if the importance of the principle here involved, or the doubt in the Judge's mind, justified the leave, what grounds were there for putting the appellants under such onerous terms ? Why should a suitor be thus shackled in resisting what eventually turns out to be an unsustainable claim ? It is submitted that the law should not permit a Judge of an inferior Court to deprive a superior Court of its discretion as to costs. When the

\* W.N., 1879, p. 70.

sum in dispute exceeds £20 either party can appeal as of right, but the right is almost non-existent through the stringent limitations which beset it. An appeal as of right exists only upon matters of law, or on the admission or rejection of evidence.\* It may be prosecuted in the form of a special case, to be settled by the Judge, who may so state it as to give the appellant no chance whatever. Since the Act of 1875, an appeal may be by motion also, but the motion must be founded exclusively on the Judge's notes, which comes to the same thing in the end. The Judge may state his notes in such a way as to bring under observation only those facts which will support his own ruling, and as evidence *aliunde* is inadmissible, he has just the same power of stating the appellant out of Court as he had previously. Then it should also be borne in mind that in many cases the law and the facts are so interwoven, that whereas the appeal can only be upon the law, and not upon the facts, the finding of the fact is so inseparably intermixed with the finding of the law, that to all intents and purposes there is no appeal whatever. Can it be truthfully urged that all the County Court Judges, their deputies, and the juries are so infallible that no appeal from their conclusions of fact should be deemed necessary?

The high scale of costs in the County Court has been for some time past a constant source of complaint, and yet the Bill contains no remedial provision in that behalf. It was a maxim of Jeremy Bentham that legal proceedings should be free to all, and the costs should be borne by the nation. Although few people may be prepared to go that length, all will agree that legal expenses should press as lightly as possible on the working classes. Instead of this, what do we find? The process of the much-vaunted poor man's Court is actually dearer in many important particulars than that of the Superior Courts. For instance, a 5s.

\* Sec. 14 of County Courts Act, 1850.

stamp will secure the issue of process in the High Court of Justice to recover *any* amount, while for a County Court action a fee of 21s. is exacted, when the sum claimed does not exceed £21. Again, in the County Court, a plaint for £25 costs upon service of summons £3; on a writ in the High Court the fees would amount to £2 15s. So, on judgment by default for the same sum, the costs in the County Court are £4. 3s. 4d.; in the Superior Court £4. 3s. The difference in the latter instance is small indeed. but it is a difference on the wrong side. A tax of 15 per cent. on the amount sought to be recovered is levied on the County Court suitor as his contribution towards the expenses of the administration of justice. The high scale of Court fees acts most injuriously on the labouring community, for when they are behind-hand in their payments to merciless creditors, the expenses accumulate at such a rate that they can scarcely ever recover their position even by the most rigid economy. Another great difference in the efficiency of the Superior Courts as against the County Court is, that everything in the least degree contested is, in the case of the former, sent up to London from the district registry to be dealt with by the London agent of the country firm of solicitors at a merely nominal expense, whereas in the country, a journey to the County Court may involve travelling some twenty or thirty miles for every step to be taken in the cause.

Then as to delay. Much time is wasted by the process being in the hands of the official instead of in the suitor's. It makes all the difference of prompt service or of service not at all, in some instances. Undisputed cases are disposed of in the High Court much more expeditiously than in the County Court. A County Court summons is seldom made returnable for less than a month, and as the Court is not organised for deciding interlocutory applications, it is absolutely without the machinery necessary for the conduct of litigation during the interval between the date of issuing

the plaintiff and the day of the return of the process. On the return day, the suitor has first to do penance in a crowded and ill-ventilated room, whilst the Registrar sifts the defended from the undefended actions. He is then drafted before the Judge, possibly to find himself at the end of a list of judgment and adjourned summonses. Trumpery and important cases take their places in one list without distinction, and if, as often happens, at the end of a long day of weary waiting, the suitor's case has not been reached, it is adjourned to a convenient day, "a fortnight or a month hence." When a new trial is desired, it frequently cannot be moved for until a fortnight, three weeks, or a month after the hearing, whereas in the High Court the dissatisfied party can move within four days after trial. Although a disputed case cannot be disposed of so quickly in the Superior as in the Inferior Courts, yet instances are not wanting where this temporary inconvenience was fully compensated for by obtaining the judgment of a Superior Court. It is desirable that the administration of the law should be as perfect as possible. A bad decision carries with it a grievance that will never be forgotten by the person who suffers from it, and is a great detriment to the public. Consequently, in cases of any moment, it is an inestimable gain to suitors to try in the Superior Courts, where, among other advantages, they can secure first-rate professional assistance, and the decision of a Court of weight and authority.

So far, we have chiefly been concerned with an examination of the Bill itself and County Court procedure; but an extension of County Court jurisdiction forces upon us a further inquiry of an extremely delicate nature, namely, whether the County Court Judges, upon whom so many fresh duties have of late years been cast, will be equal to the new functions to be imposed upon them. Account must be taken of the fact that what is proposed is an addition, not only to the amount of County Court litigation,

but to the importance and presumably the difficulty of the cases that will have to be determined. In the face of these considerations it is as well to take heed of the perils attending the change. It would be unfortunate if the flow of litigation were kept up by committing important judicial work to inferior men. This is no visionary danger. With no small shadow of truth has it been more than once urged that some few of the County Court Judges owed their promotion to other causes than their judicial attainments. The majority of them, however, are worthy of all respect ; they number among them men of ability, energy, and strength of character, who would be ornaments of any Court. But their remuneration is not such as to attract many men of great talents, and they labour under deteriorating influences. Experience proves that a good Bar is a great gain to a good Judge ; astute critics and learned counsellors brighten the intellect, and this whetstone many a County Court Judge lacks. Left to himself, or if his social equals do not practise before him, he too often becomes narrow-minded and slovenly. There have been County Court Judges with exaggerated ideas of their authority, who acted too much in the spirit of feudal lords with hereditary jurisdiction, or who fancied that they carried their Courts and their powers about with them wherever they went. Such persons are exceptions, but they do serious mischief ; and anything that can be done to exclude them, and to raise the general level of the body of local Judges, would be worthy of commendation. The most obvious course would be to increase their salaries. As they sit on an average not more than about 130 to 140 days in the year, a reduction of their number and a redistribution of their circuits would accomplish this desideratum without any additional charge on the nation. If the sum of £1,500 per annum was no more than sufficient remuneration for a County Court Judge thirteen years ago, assuredly now, when his labours have been so greatly augmented, and



the purchasing power of money has so considerably diminished, it must be grossly inadequate. In view of a still further addition to their duties, it is the more to be regretted that the Government should disregard the recommendation of the Select Committee of last year to increase the stipends of the County Court Judges. A salary of £1,500 a-year, with a retiring pension, given only under certain not very gracious conditions is not a prize of sufficient value to tempt a man from the first ranks of the legal profession. A leader in Westminster Hall can, if in full practice, reckon upon securing from three to four thousand pounds a-year, and if he is willing to risk an election with its chances, has a reasonable prospect of a puisne judgeship. Such a man is not likely to shelve himself in the prime of life for a salary of thirty pounds a-week, in return for which routine work of the most arduous and uninteresting description is rigidly exacted. For the sake of the public it is to be desired that the County Court Bench should command the services, not of those great chiefs of the profession who properly regard its higher prizes as their right, but of those who occupy what may, without disparagement, be called the second rank, who are, as a rule, sound lawyers, if not always brilliant advocates. It is from among these men that our County Court Judges ought to be chosen, and not, as is now too often the case, from the back benches. It has, however, been announced that no augmentation of stipend is contemplated, but, "if," says the Lord Chancellor, "the Bill should have the effect, as it very likely will, of considerably increasing the amount of business to be transacted, it will then be for Parliament to consider whether some additional strength will not be necessary on the County Court bench—whether it will not be essential to increase the number of Judges." Far from strengthening the bench, an addition to their numbers, under existing circumstances, would, in our opinion, conduce to a result precisely the opposite of that anticipated.

A reform in the direction aimed at by the Bill would open the door to speculative cases, where solicitors set the law in motion, with little expectation of winning, but on the chance of getting something. The employment of counsel acts as a deterrent in the Superior Courts, but this wholesome check would be absent in the inferior Courts, where solicitors practice as advocates. A large accession of business in the County Court would also oblige the Judge to reside in the district over which he presides. Now it is undesirable that a Judge should be too familiarly known by the suitors, or by the Bar, or the solicitors in his Court; he ought not to have opportunities of hobnobbing with his people. He comes in time to be regarded as the friend of certain residents in the district, and he is supposed to have favourites practising before him and exercising a sinister control over his mind. The losing party is almost certain in his heart to feel that the decision of the local Judge has been biassed. Generally speaking, there exists no reason for this feeling, but everyone who has investigated our magisterial system must know that public opinion is in favour of the law being administered by persons who have no local influence or surroundings.

“Bringing justice to every man’s door” is a captivating cry, but we must calculate before-hand all contingencies, lest a step be taken, the evil consequences of which may not become apparent until the mischief is irreparable. The benefits flowing from a great body of law, administered, tempered, and checked by a central body in London, under the keen eyes of the public, are not to be hastily laid aside for a vain chimera. An extensive development of County Court jurisdiction would, if successful, do one of two things. It would either extinguish all save the appellate business of the High Court—a result not contemplated by the authors of the Judicature Acts, nor advantageous to the interests of Justice—or, if the County Courts were to attract a considerable amount of business, but there still remained

sufficient to occupy the Superior Courts, there would be two concurrent jurisdictions guided by different rules and out of harmony with each other.

We have lastly to consider how the proposed change would operate on the Bar. The Bar it is said, has, from interested motives, persistently resisted all attempts to localize our system of judicial administration. But the Bar, though it may not approve proposals out of harmony with its traditions, is too patriotic to place itself in hostility to any measure which would confer a substantial benefit on the nation. The Bar has ever shown a readiness to sacrifice all personal considerations to the just demands and requirements of the public. On the other hand, no one can have any doubt that the welfare of the country to a great extent depends upon having not merely an illustrious, but an honest, independent, high-minded Bar. The country is unfeignedly proud of its Judges ; their ability, dignity, and above all their impartiality, have won for them a world-wide reputation ; but these qualities so highly prized are mainly derived from a lengthened apprenticeship at the Bar. Any reform therefore that would cause the source from whence their ranks are replenished to deteriorate, would strike at the well-being of English society and tarnish our prestige amongst foreign nations. The high standard of forensic excellence to which the Bar has attained, is, for the most part, attributable to the refined intellectual atmosphere in which its members move. To be constantly practising before the most eminent Judges, and to be continually pitted against the most talented opponents, burnishes the wits and maintains their brilliancy. The keenness of this wholesome competition would be minimized by a successfully pursued policy of decentralization ; but, what is more to be dreaded, localization would disintegrate the Bar into petty cliques, and with its dismemberment the *esprit de corps* animating it would suffer annihilation.

B. L. MOSELY.

## Legal Obituary of the Quarter.

(ENGLAND, SCOTLAND, AND IRELAND.)

ARDEN, Joseph, of Rickmansworth Park, Herts, and of Gray's Inn, Esq., Barrister-at-Law, &c., Benchet, aged 79. Called 1840. Principal of Clifford's Inn, J.P. and D.L. for Middlesex, and J.P. for Hertfordshire. *Jan.* 30.

BARTLEY, the Hon. Thomas Houghton, late Speaker of the House of Legislative Assembly, New Zealand, and of the Inner Temple, Barrister-at-Law, aged 80. Called 1823. *Dec.* 25.

BATESON, Samuel Stephen, of Cambusmore, Sutherlandshire, and of the Inner Temple, Esq., Barrister-at-Law, aged 57. Younger son of the late Sir Robert Bateson, Bart., of Belvoir, Co. Down. J.P. and D.L. for Sutherlandshire. Called 1847. *March* 9.

BEVERIDGE, Patrick Sandeman, Esq., S.S.C. (Scot.) Admitted 1850. *Feb.* 14.

BICKNELL, Henry Edgeworth, Esq., late Senior Registrar of the Court of Chancery (retired 1859), aged 91. *Feb.* 20.

BURKITT, John, of Lincoln's Inn, Esq., Barrister-at-Law, aged 82. Called 1830. *March* 26.

BURWASH, Sydney, Esq., Notary Public, aged 38. Admitted 1874. *March* 24.

BYERS, James Broff, Esq., Solicitor, aged 63. Admitted 1841. *Feb.* 10.

CATES, Francis Nethersole, of Lincoln's Inn, Esq., Barrister-at-Law, formerly a Solicitor, aged 51. Called 1863. *April* 2.

CLARKE, Richard, Esq., Solicitor, Shrewsbury, aged 66. Admitted 1860. *Feb.* 11.

CORBALLIS, John Richard, Esq., LL.D., Trin. Coll., Dublin, Q.C. (Irel.), aged 82. Called 1820. J.P. for Cos. Dublin and Meath, and City of Dublin. *Feb.* 13.

CULLEN, James, Esq., Solicitor (Irel.) *Feb.* 18.

CURRIE, Edmund, of West Burton House, Sussex, and of the Inner Temple, Esq., Barrister-at-Law, aged 76. M.A., Wadham Coll., Oxon. J.P. for Berks and Hants. *March* 4.

CURTIS, Thomas Acres, Esq., Solicitor, Guildford, aged 61. Admitted 1839. *Jan.* 24.

DAY, William, of Lincoln's Inn, Esq., Barrister-at-Law, aged 76. Called 1832. *Jan.* 31.

DE QUETTEVILLE, David, Esq., Judge of the Royal Court, Jersey, for 28 years. *Jan.* 27.

DOONER, John, Esq., Solicitor (Irel.), aged 71. Admitted 1829. *Jan.* 24.

DORMAN, William Henry, Esq., Solicitor, Ramsgate, aged 41. Admitted 1860. *March* 10.

DUNN, Thomas John, Esq., Notary Public (Scot.), aged 65. Admitted N.P. 1839. *Jan.* 6.

FAITHFULL, Edward Williams, Esq., Solicitor, aged 55. Admitted 1846. *Jan.* 22.

FOSTER, Peter Le Neve, of the Middle Temple, Esq., Barrister-at-Law, aged 69. M.A. and Fellow of Trin. Coll., Camb. (38th Wrangler, 1830). Called 1836. Secretary to the Society of Arts since 1853, and Editor of the *Society of Arts Journal*. *Feb.* 20.

FRANKS, William, of the Inner Temple, Esq., Barrister-at-Law, aged 58. M.A., Trin. Coll., Camb. J.P. and D.L. for Herts, and J.P. for Middlesex. Called 1846. *Feb.* 8.

GAMMON, Charles, Esq., Solicitor, aged 55. Admitted 1847. *April* 6.

GIBSON, John, Esq., W.S. (Scot.), aged 89. Admitted 1818. *Jan.* 31.

HANDCOCK, the Hon. Charles, Barrister-at-Law (Irel.), aged 70. Second son of the second Lord Castlemaine. Called 1833. J.P. for Westmeath. *Feb.* 13.

HARDINGE, William Henry, Esq., Barrister-at-Law (Irel.), late Keeper of the Landed Estates Records, aged 78. Called 1829. *Jan.* 20.

HARRISON, Henry William Fortescue, of the Middle Temple, Esq., Barrister-at-Law (late 17th Lancers). Called 1864. *Feb.* 25.

HARTIGAN, Edward, Esq., Solicitor (Irel.), aged 56. Admitted 1844. *Feb.* 23.

HEATHCOTE, Godfrey, Esq., Solicitor, Doncaster, aged 43. Admitted 1856. *March* 22.

HUGHES, Henry, Esq., Solicitor, Maidstone. Admitted 1851. *Jan.* 22.

JACKSON, William Maxwell, Esq., Solicitor, Hull, aged 43. Admitted 1856. *Feb.* 16.

KENNEDY, Right Hon. Thomas Francis, of Dalquharran and Dunure, Advocate (Scot.), aged 90. Called 1811. Educated at Harrow, and University of Edinburgh. J.P. and D.L. for Co. Ayr. M.P. for Ayr Burghs (Liberal), 1818-34. A Lord of

the Treasury, 1833-4. P.C. 1837. Commissioner of Woods and Forests, 1850-54. *March 1.*

KYLE, William Cotter, Esq., LL.D. Trinity Coll., Dublin, Barrister-at-Law (Irel.), aged 77. Called 1825. Secretary to Board of Endowed Schools. J.P. for Co. Roscommon. *March 25.*

LAWLEY, Frederick, Esq., Solicitor, Rugeley. Admitted 1839. *March 28.*

LEE, William, Esq., Solicitor, Sandwich, aged 79. Admitted 1820. *March 23.*

LEEMING, Charles, of the Middle Temple, Esq., Barrister-at-Law, Knight of the Papal Order of St. Gregory, aged 51. Called 1854. *Jan. 4.*

LEONARD, Maurice, Esq., Solicitor (Irel.), aged 74. Admitted 1829. *March 1.*

LEWIS, George Coleman Hamilton, Esq., Solicitor, aged 73. Admitted 1834. *March 13.*

MAC DONALD, William Patrick, of the Middle Temple, Esq., Barrister-at-Law. Called 1864. *April 4.*

MANDER, Henry Waterland, of Lincoln's Inn, Esq., Barrister-at-Law. Called 1847. *Jan. 31.*

MASTERMAN, William Stanley, Esq., Solicitor, Croydon. Admitted 1838. *Feb. 20.*

MILLIGAN, John Swan, Esq., S.S.C. (Scot.) Admitted 1850. *Feb. 21.*

MOORE, Edward, Esq., Solicitor (Irel.), aged 82. *Feb. 16.*

MORGAN, Francis, Esq., Solicitor (Irel.), aged 73. Admitted 1833. *March 15.*

MORRIN, James, Esq., Solicitor (Irel.) *March 5.*

MURRAY, John, Esq., S.S.C. (Scot.) Admitted 1836. *Jan. 23.*

NEATE, Charles, of Norham Manor, Northumberland, and of Lincoln's Inn, Esq., Barrister-at-Law, aged 71. M.A. and Senior Fellow of Oriel Coll., Oxon. Called 1832; but his legal career was abruptly closed after a few years, in consequence of the spirited but unprofessional manner in which he resented an insult received in Court from Mr. Bethell (afterwards the late Lord Chancellor Westbury). After filling the post of Secretary to Sir Francis Baring, Chancellor of the Exchequer, Mr. Neate subsequently returned to Oxford to reside on his Fellowship. In 1857 he was appointed Professor of Political Economy at Oxford, and the same year was elected M.P. (Liberal) for Oxford City, but was unseated on petition. He was re-elected in 1863, and sat till 1868. Before going to Oxford, Mr. Neate

received his education in France, and won the Essay Prize open to all France, an honour which was also carried off by his great friend Sainte Beuve. He published several brochures in French, Latin, and English, writing all three languages with equal ease and lucidity. Genial, kind-hearted, and vivacious, he will be regretted by many both within and without the University, in the affairs of which he always displayed so active an interest.  
*Feb. 7.*

NICHOLSON, Joseph, of the Middle Temple, Esq., Barrister-at-Law, aged 59. B.A. Caius Coll., Camb. Called 1844.  
*March 26.*

OGLE, Robert, of Erlingham Hall, Northumberland, and of the Inner Temple, Esq., Barrister-at-Law, aged 61. B.A., B.N.C., Oxon. J.P. for Northumberland. Called 1846. *March 15.*

OLDHAM, Henry, Esq., Solicitor (Irel.), aged 65. Admitted 1839. *Jan. 14.*

PARKER, Arnold, Esq., Solicitor, Sheffield, aged 45. Admitted 1852. *March 17.*

PARKER, William, of Ware Park, Herts, and of Lincoln's Inn, Esq., Barrister-at-Law, aged 75. J.P. and D.L. for Herts, and J.P. for Middlesex. Called 1849. *April 9.*

PEARCE, James, Esq., Solicitor, Woolwich, aged 69. Admitted 1831. *April 9.*

PLASKITT, William, Esq., Solicitor, Gainsborough, aged 68. Admitted 1835. *Jan. 30.*

QUAYLE, Mark Hildesley, Esq., Clerk of the Rolls for the Isle of Man, aged 74. Called to the Manx Bar 1825. *March 19.*

RENNY, William John, Esq. W.S. (Scot.), aged 56. Admitted 1844. J.P. and D.L. for the Stewartry of Kirkcudbright.  
*Jan. 25.*

RHODES, Thomas, Esq., Solicitor, Market Rasen, aged 88. Admitted 1816. *March 29.*

ROBERTS, William, Esq., formerly Solicitor, Rochdale, aged 67.  
*Feb. 18.*

ROMNEY, Churchill, Esq., Solicitor, Tewkesbury, aged 39. Admitted 1860. *Jan. 29.*

SANDES, Maurice Fitzgerald, Esq., Barrister-at-Law (Irel.), aged 71. Called 1831. B.A., Trinity Coll., Dublin. Registrar of the Supreme Court, Calcutta, 1848. Administrator-General of Bengal, 1850. J.P. for Co. Kerry. *March 4.*

SEMPLE, David, Esq., F.S.A., Scot., Writer (Scot., 1828), aged 70. *Dec. 23.*

SMITH, Arthur Denman Tyler, of the Inner Temple, Esq.,

Barrister-at-Law, aged 38. LL.B., Trinity Coll., Camb. Called 1870. *March 1.*

STRUTT, John., Esq., Solicitor, aged 70. Admitted 1830. *March 19.*

TAIT, James Campbell, Esq., W.S. (Scot.), aged 81. Admitted 1823. Son of the late Craufurd Tait, Esq., W.S., by Susan, daughter of the late Sir Islay Campbell, Bart., of Succoth (Lord Succoth, and Lord President of the Court of Session), and elder brother of the present Archbishop of Canterbury. *Jan. 17.*

TORRANCE, John, Esq., W.S. and S.S.C. (Scot.) *Feb. 20.*

UDNY, George, of Lincoln's Inn, Esq., Barrister-at-Law (late of the Bengal Civil Service), aged 56. Called 1855. *April 7.*

WATSON, William, Esq., Solicitor, Hull. Admitted 1850. *Jan. 25.*

WEBSTER, James, Esq., S.S.C. (Scot.) Admitted 1839. *Feb. 4.*

WHITAKER, Marmaduke William, of the Inner Temple, Esq., Barrister-at-Law, aged 41. B.A., Trinity Hall, Camb. Deputy Chairman of Quarter Sessions, Liberty of Ripon. Called 1862.

WHITE, Archibald, of Lincoln's Inn, Esq., Conveyancer, Great Missenden, Bucks, aged 78. Admitted 1827. *March 3.*

WHITEHURST, Charles Howard, of the Middle Temple, Esq. Q.C., and a Bencher, aged 82. B.A., Oxon. Called 1822. *March 13.*

WILSON, Thomas R., Esq., Solicitor (Irel.) Admitted 1863. *March 14.*

WOOD, Charles Paul, Esq., Solicitor, aged 50. Admitted 1849. *Feb. 12.*

WRIGHT, Thomas, Esq., Solicitor, Carlisle. Admitted 1849. *March 30.*

WRIGHTSON, William Battie, of Cusworth, Yorkshire, and of Lincoln's Inn, Esq., Barrister-at-Law, aged 89. Called 1815. M.P. (Liberal), for East Retford in 1826, but unseated on petition; for Hull 1831-2, 1835-65. J.P. and D.L. for West Riding of Yorkshire. *Feb. 10.*

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## Reviews of New Books.

*The Law of the Office and Duties of the Sheriff.* With the Writs and Forms relating to the Office. By CAMERON CHURCHILL, B.A., of the Inner Temple, Barrister-at-Law. Assisted by A. CARMICHAEL BRUCE, B.A., of Lincoln's Inn, Barrister-at-Law. Stevens & Sons. 1879.

The opening paragraphs of this book are somewhat disappointing. We do not expect writers on technical law to be profound historians, but we have a right to expect from two learned authors who undertake to give, however briefly, an account of the "origin" of the office of Sheriff, something better than an extract from Dalton, quoting "an ancient writer," Speed (who published his History in 1614), to the following effect. "Alfred first dividing this Kingdom into several counties or shires, instituted a prefect, or lieutenant, in each of those counties, which [*sic*] were then called *custodes* and afterwards *comites*, earls, who were to keep the counties in obedience," &c. Further on we are told, on the authority of Dalton, "but afterwards, when estates for life and inheritance were granted of the office, then the *vice-comites* were made who had the same authority that the ancient *comites* had." The proverbial schoolboy, if consulted by Messieurs Churchill and Bruce, could have informed them that the ascription to King Alfred of the division of England into shires was a vulgar error, and could have given them the very good reason that only a portion of this kingdom was ever subject to Alfred's sway. In his own kingdom of Wessex, the division and even the name of "shire" existed long previously, in the reign of Ina, who speaks of the "Scirman, or other judge," refers to the forfeiture of his *scir* by an ealdorman, and forbids the dependent to withdraw from his lord into another *scir*. On the other hand the arrangement of the whole kingdom in shires could not possibly have been completed until it was first permanently united under Alfred's great-grandson, Edgar. But in fact, as Palgrave and Stubbs have pointed out, the historical shires or counties owe their origin to various causes. Some like Kent, Sussex, Essex, Middlesex and Surrey, represent ancient kingdoms. Norfolk and Suffolk are two divisions of East Anglia, probably representing the "fylkis," or folks, into

which the Norsemen divided their province; and several of the Northern shires have become such since the Norman Conquest. The early history of the Sherifdom is both interesting and constitutionally important. The title of "*vice-comes*," by which the shire-reeve was known subsequently to the Conquest, is apt to mislead. The ancient shire was subject to a system of double government by ealdorman and scir-gerefa, the former being a national officer, chosen by the King and Witan, and frequently administering several shires, while the latter was the King's steward and judicial president of a single shire, and, as a rule, was nominated by the King alone. While the ealdormanships tended to become hereditary, the office of Sheriff did not; and it was by means of the Sherifdom that the Norman and Plantagenet Kings were enabled to oppose one powerful obstacle to the growth of a Continental feudalism within the jurisdictions of the great Earls. Our authors profess to "summarize briefly what the authorities have stated on the subject," but it would seem either that they themselves are yet in blissful ignorance as to the "authorities" on Legal History and Constitutional Law, or that the names of Palgrave, Kemble, Stubbs, *cum multis aliis*, are to them names and nothing more.

Turning from the chapter on the "origin and appointment" of the Sheriff to the more technical parts of the book, we are glad to be able to speak in higher terms. The functions of the Sheriff are conveniently treated under the two divisions of Judicial and Ministerial. The first division is sub-divided into five parts, discussing of his judicial duties (1) at the election of coroners; (2) in outlawry proceedings; (3) in the election of Members of Parliament; (4) on a writ of inquiry; and (5) in the Compensation Court. Similarly the Sheriff's Ministerial duties are grouped under the five heads of (1) at assizes; (2) in the summoning of juries; (3) in the execution of criminals; (4) as to interpleader; and (5) in the execution of writs. The final chapter treats of the remedies against Sheriffs, both by way of attachment and by action, and of the evidence to connect the Sheriffs. The Appendix contains a collection of 156 Forms, and also extracts from the 19 and 20 Vict., c. 108, as to priority of process issuing out of the High Court and the County Court, and from the Bills of Sale Act, 1878. The authors appear to have taken pains to be accurate and concise, and are always careful to support their propositions in the text by references to decided cases and other trustworthy authorities. High Sheriffs (who, being personally responsible for the acts of

their subordinates, ought to take some trouble to acquire a knowledge of their rights and duties), Under-Sheriffs, and lawyers generally, will find this a useful book to have by them, both for perusal and reference.

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*Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius.* Fourteenth Edition. By JOHN C. DAY, Esq., one of Her Majesty's Counsel, and MAURICE POWELL, M.A., of the Inner Temple, Esq., Barrister-at-Law, late Scholar of Trinity College, Cambridge. Stevens & Sons. 1879.

The Fourteenth Edition of this standard work, which may be said to be an indispensable adjunct to every Common Law barrister's library, is the first which contains the numerous alterations and additions necessitated by the changes in pleading and practice under the Judicature Acts and Rules. The task of adapting the old text to the new procedure was one requiring much patient labour, careful accuracy, and conciseness, as well as discretion in the omission of matter obsolete or unnecessary. An examination of the bulky volume before us affords good evidence of the possession of these qualities by the present Editors, and we feel sure that the popularity of the work will continue unabated under their conscientious care. Notwithstanding the large amount of new matter, including brief statements of the equity rules on equitable points likely to arise under the Judicature Acts, at Nisi Prius, Messrs. Day and Powell have contrived, by judicious excision and compression, to restrain the size of the volume within its former limits, and even slightly to reduce it. In the preparation of the Index, which alone occupies nearly three hundred pages, and in the collation of cases cited (which fill seventy-eight pages) the Editors have had the advantage of Mr. Tudor Boddam's assistance.

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*The Patentee's Manual*, being a Treatise on the Law and Practice of Letters Patent. By JAMES JOHNSON, of the Middle Temple, Barrister-at-Law, and J. HENRY JOHNSON, Assoc. Inst. C.E., Solicitor and Patent Agent. Fourth Edition. Longmans, Green & Co. 1879.

This, the fourth and much enlarged edition of "Johnson's Patentee's Manual," leaves little if anything to be desired in a work of this character. The position of the authors, the one

a Barrister, the other a Solicitor, Patent Agent, and Associate of the Institute of Civil Engineers, affords them a special facility for treating the subject of Patent Law from a comprehensive standpoint, in its legal and scientific, its theoretical and practical aspects. The work is indeed not only instructive but interesting reading, owing to the many inventions which are briefly described in illustration, mainly from decided cases, of the incidents of utility and novelty which must by law accompany patentable inventions. Both patentees, and Inventors who seek to become such, will find in this volume full information of a practical character as to what may be the subject of a patent; who may be a patentee; the requirements as to provisional and complete specification; oppositions to the grants of patents (a new and useful chapter added to this edition); disclaimers; confirmation; extension or prolongation; assignments; infringements (both as to Practice and the Substantive Law); and as to many other topics connected with Patents and Patent Law. The legal part of the work shows evidence of much care, the latest decisions being noted, and for the most part the *ipsissima verba* of important judgments being given. Members of both branches of the profession, who may have occasion to get up Patent Law and Practice, will find this manual a valuable aid. In the Appendix is given a reprint of all the Acts of Parliament, from the Statute of Monopolies of 21 Jac. I., c. 3 downwards, together with a most useful collection of concise *resumés* of the Patent Laws of foreign countries, and of our own Colonies. The special attention of inventors is drawn by the authors to the recent very important Patent Law for the whole Empire of Germany, which came into operation on July 1st, 1877, by virtue of which a single patent may now be obtained where formerly many were requisite, and those difficult of procurement.

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#### SMALLER BOOKS AND PAMPHLETS.

In *Auctioneers: their Duties and Liabilities* (Crosby Lockwood and Co., 1879) Mr. Robert Squibb has provided for his brothers of the hammer and their pupils a work "of a semi-legal character," consisting mainly of extracts from reported cases and legal text-books illustrating the various legal duties and liabilities of auctioneers, together with much useful information on Valuing, on Tithes and House Agency, &c. The work will probably

prove acceptable to those for whom it is intended, but on the principle *ne sutor ultra crepidam* we think it is a pity that Mr. Squibb did not secure the co-operation of some member of the profession to revise the strictly legal portion of his book: had he done so, we should probably have been spared such choice specimens of what we presume is intended for Latinity as "sub hastem venire," "atria auctianoria," "reduction ad absurdam," tenant "in capiti," Statute "De Denis," Statute "de prerogative."

In the second edition of his "*Digest of the Law relating to Public Libraries and Museums*" (Stevens & Sons, 1879), Mr. G. F. Chambers has extended its scope so as to include the Law relating to all kinds of institutions connected with Literature, Science and Art. The statutes are given in full, together with brief notes of leading cases; and there is also much other information of a practical nature which managers and officers of clubs and associations will find very handy in its collected form.

Mr. James Walter may claim to have anticipated to some extent the practice of stating the law in the form of a Digest, of which we have lately had several examples. The first edition of his *Manual of the Statutes of Limitations*, published in 1862, attracted the favourable notice of Lord St. Leonards. A third edition (London: Wyman & Sons, 1879) is now called for, and we can confidently recommend it to those who wish to see at a glance the substance and effect of recent changes in this very important branch of the law. Mr. Walter has arranged the provisions of all the Limitation Statutes in tabular form, stating against each head of the subject the rule of Limitation by which it is governed. Laymen in particular will be grateful for what in effect is a Dictionary of a very difficult series of Acts.

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\* \* \* Pressure on our space compels us to postpone several Reviews, including the second Vol. of Sir Travers Twiss's "*Bracton*," just published, as well as our usual "*Quarterly Notes*" and "*Select Cases*"

# THE LAW MAGAZINE AND REVIEW.

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No. CCXXXIII.—AUGUST, 1879.

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## I.—THE LAW OF PERSONAL CAPACITY AS APPLIED TO CONTRACT.

A STATEMENT of Lord Justice Cotton in a recent judgment delivered by him as the judgment of the Court of Appeal, the other Judges being Lords Justices James and Baggallay, has been commented on with considerable severity by two writers; Mr. Foote in his book on Private International Law and Mr. Patrick Fraser in his great work on the Scotch Law of Husband and Wife. The case which the Appeal Court had to decide was whether a marriage solemnized in England between two Portuguese subjects, domiciled in Portugal and first cousins to each other, was valid, first cousins being by the law of Portugal incapable of marrying, and a marriage between them being held to be incestuous and therefore null and void. The Court of Appeal decided that the marriage was null and void, apparently on the ground that the question of personal capacity must be decided by the law of domicile, and in the course of the judgment, Lord Justice Cotton, as reported, said, “It is a well recognised principle of law that the *question of personal capacity to enter into any contract is to be decided by the law of domicile.*”<sup>\*</sup> It is to this statement that Mr. Foote and Mr. Fraser have taken objection, on the ground that the principle stated has never been recognized by the Courts of this country.

<sup>\*</sup> *Sottomayor v. De Barros*, L.R. 3 P.D. 1.

Now, I have no intention here of entering into the question whether it is proper to treat marriage as a contract, or to decide the validity of marriages by the light of principles which are applicable to contracts, or whether a law prohibiting the marriage of first cousins has anything to do with personal capacity. All I propose to consider is, what is the true application of International Law to personal capacity, what are the different theories which have been held on the subject, which of them prevails on the Continent, which in England, and how far Lord Justice Cotton's statement is correct.

In the first place, it must be borne in mind that personal capacity, which means the capacity of a person to take rights and to incur duties, is a part, and only a part of personal status. The status of an individual, says Lord Justice Brett, in the recent case of *Niboyet v. Niboyet* (L.R. 4 P.D. 1), "means the legal position of the individual in or with regard to the rest of the community." According to Austin it signifies the set of rights and duties, and the capacities and incapacities to incur them, affecting and peculiar to a particular class of persons. It will be seen that to make the two definitions quadrate, "an individual" must be substituted in Austin's definition for "and peculiar to a particular class of persons." But whether "status" be taken to signify the rights, &c., of each individual citizen, or whether it be more correctly limited to the rights, &c., of particular classes, such as husband and wife, infant, or trader, does not matter for the purpose of the present discussion. For our purpose the "status" of an individual may be defined as the sum of his rights, duties, capacities and incapacities.

The question will thus assume this form: What is the true principle of International Law with regard to personal status? Have statutes which affect it an extra-territorial or only a territorial force? Is it governed by the *lex*

*domicilii* or the *lex loci*? Now so far the path is easy; all writers on Jurisprudence and International Law, with the exception of Gail and the younger Voet, are agreed that a man's status follows him everywhere. "Les lois personnelles," says Fœlix, who adopts the now untenable distinction between *real* statutes and *personal* statutes; "suivent la personne partout où elle se trouve." Savigny lays down the same rule in more accurate terms: "Everyone is to be judged as to his personal status by the law of his domicile." In the leading cases of *Fenton v. Livingstone* and *Birtwhistle v. Wardell*, we find the same principle approved of and by some of the judges enumerated in the expressive formula: "Qualitas personam, sicut umbra, sequitur."

And for the latest exposition of the English law on the subject we may refer again to Lord Justice Brett in *Niboyet v. Niboyet*, where he says: "The limitations, or conditions, or effects of status are different in different countries. As status is imposed by law, the only law which can impose or deprive such a status so as to bind an individual, is the law to which such individual is subject." And further on, "Laws which alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural-born subjects of the enacting country, or foreigners who have become domiciled in it; but they may, consistently with principles and with the universal consent of nations, bind both of these." The learned judge then proceeds to test the correctness of the principle by putting the argument in the following shape: A man's right to his status, is a right *in rem*, that is to say, a right which is available against the whole world. Now, one of the first principles of International Law is that a judgment *in rem* is treated as binding and valid by the Courts of all countries. Therefore, a judgment determining what the status of an individual is, being a judgment *in rem*, ought to be treated as binding and valid everywhere. But if the Courts of any



country should assume by a decree to alter the status of a foreigner not domiciled, the decree would not be recognised as binding by the Courts of any country. The logical conclusion is, that the only law which can alter, and therefore decide status, is the law of domicile.

We find then that there is an almost unanimous consensus of opinion in favour of the principle that status must in general be decided by the law of domicil. It is only when we come to apply this principle to the question of capacity to contract, that we meet with contradiction and discord. The question, however, is a most important one, especially in these times, when the law of contract is every day assuming larger dimensions, and the law of status is becoming more and more confined. I have said that status must *in general* be decided by the law of domicile. It will perhaps be as well, before going any further, to say something about the exceptions to the general rule. Savigny classifies them under two heads: (1.) Laws relating to personal status, which by their anomalous nature lie beyond the limits of community of law subsisting between independent States, are not regarded by foreign Courts—statutes which recognise polygamy, heresy, religious disabilities, civil death, or slavery, are given as instances. (2.) Other cases form an exception, on the ground that the questions involved in them do not refer at all to the capacity to have rights or the capacity to act—the instances given are cases of privilege.

But, as Savigny himself seems to imply, and as it has been pointed out by Austin, privileges do not belong to the law of status at all; they distinguish persons, considered singly, as opposed to status which distinguishes persons as members of a class. We may, therefore, dismiss privileges from our consideration as being mere anomalies, which cannot be recognised by International Law. The first and only real class of exceptions is more important, as an objection has been made to Savigny's theory, on the

ground that the number of exceptions which he allows to the general principle, virtually makes it of no effect. A little consideration of the true nature and province of private International Law, will show us that the exceptions are perfectly logical, and will perhaps furnish us with a clue which may be useful, when we come to consider the far more difficult question of capacity to contract. Private International Law, or Comity, is a collection of positive rules, which civilised nations have tacitly agreed shall be binding upon them in deciding upon the rights and duties of foreigners who come under the jurisdiction of their law courts. It is solely a matter of agreement; there is, therefore, nothing to prevent any nation from refusing to be bound by any of the rules agreed upon by other nations, or from making any arbitrary statutes with regard to its treatment of foreigners. A nation, however, which follows this course will probably be considered as somewhat deficient in enlightenment and liberality, though not as being beyond the pale of civilization. Private International Law is, therefore, different from Public International Law, which, though sometimes modified by treaties, is not a matter of agreement, but a matter of right. It is founded on the positive morality common to all civilized nations, and is a branch of what modern writers on Jurisprudence call Natural Law, meaning thereby all law and all morality which is common to all known societies, whether political or natural, and which is, therefore, supposed to be universal or general. A far better name for it is the Divine Law, or the Law of God. Grotius, indeed, and to a still greater extent, Puffendorf and his other followers, made the whole system of Public International Law depend upon this supposed Law of Nature, but the error of this theory has been so clearly pointed out by Austin and Sir H. Maine, that we shall probably hear less of it in the future. Public International Law, says Austin, is a branch of positive morality, and should be

more correctly termed "Positive International Morality." By most Roman jurists it is called "*Jus feciale*," or the Law of Diplomacy; by Grotius and other moderns, "*Jus belli*." Private International Law has quite a different origin. The first germ of it is to be found in the "*jus gentium*" of the old Roman law—not "*jus gentium*" in the meaning, which it afterwards acquired, of "*jus naturale*," but that law common to all the positive systems known to the Romans, which first the *Recuperatores* and then the *Prætor peregrinus* applied to the decisions of cases involving the rights of persons who were not Roman citizens. It is certainly true, as stated by Mr. Foote, that Private International Law, in its modern sense, was unknown to the Romans. And, indeed, so long as the universal suzerainty of an Imperial head was admitted in theory, so long as the idea of a Holy Roman Empire, to which the whole civilized world owed allegiance, found a place in the writings of jurists, it was impossible for International Law of any sort to exist. It was not till territorial sovereignty was fully recognised that the labours of Grøtius became possible.\* But still, I think, it must be admitted that the conflict between the laws of different nations bears a strong resemblance to the conflict between the laws of different tribes or classes of a nation, and that the modern idea of the conflict of laws may be traced up to the old Roman one, although the remedy applied to reduce this conflict to harmony may have been a different one. Moreover, if we pursue the historical inquiry, we shall find a similar conflict of laws prevailing between the different tribes which composed the various Gothic, Frank, and Lombard kingdoms, which were founded upon the ruins of Rome. And in France a conflict of laws must constantly have been taking place, owing to the division into the Pays de Droit Écrit and the Pays de Droit Coutumier. If, then, we consider that French jurists—such as Dumoulin, the great

\* See "Maine's Ancient Law," ch. iv.

authority on the old *Droit Coutumier*—constantly appealed to the natural law as the highest source of law, as the remedy for all conflicting rules, and if we compare this with the practice, which grew up among the *Prætors*, of taking the same natural law for their guiding principle in the decision of cases which involved the rights of aliens, we seem to get some sort of precedent for our guide in the present inquiry. The rules of Private International Law can only be made by tacit agreement, but the principles which should guide nations in making these rules must be founded on positive morality, which, as we saw, ought to take the place of this supposed Natural Law. We thus get a bond of union between Public and Private International Law, namely, that they are both founded on positive morality. Savigny's exceptions are, therefore, perfectly logical; for a code of rules which professes to be guided by the positive morality common to the nations conforming to that code, cannot be expected to take notice of statutes which lie outside that common morality. Savigny's exception might, I think, be put with advantage in the following form: that *no nation will recognise a law which is contrary to its own system of positive morality*. This will include every case, and will also include the two exceptions mentioned by Savigny in another place, viz., (1.) Laws of a strictly positive imperative nature (*Gesetze von streng positiver, zwingender Natur*.) (2.) Legal institutions of a foreign State, the existence of which is not recognised at all by ours. The difference between an institution or statute which is contrary to the positive morality of a nation, and an institution or statute which is merely contrary to its positive law, will be seen by one or two instances. Polygamy is clearly contrary to our system of morality; it would be impossible for a member of Parliament to bring in a Bill to introduce polygamy, no discussion on such a subject could be permitted. On the other hand, marriage with a deceased wife's sister is certainly contrary to our positive law, but it is not contrary to our morality.

We do not consider it immoral, but only inexpedient, and therefore the subject is perpetually being discussed in both Houses of the Legislature. With regard also to the rights of married women, we take what may be called a neutral ground. In our country married women labour under considerable disabilities, but we should certainly recognise the law of a foreign country which put married women upon perfect equality with men, though it is quite conceivable that there might exist some small republic in which any incapacity attached to a married woman was considered absolutely immoral, and therefore not recognised in its law courts.

I now come to the consideration of the different theories on the question of personal capacity to contract. There are three theories, of which, however, only two deserve the name of a theory, and only two have met with any favour in practice. The first theory is, that the capacity to contract must, with the exceptions before mentioned, be decided by the law of domicile, the second that it must be decided by the "*lex loci contractûs*," and the third that the abstract "status" must be judged according to the law of domicil, but the capacity arising from the status by the "*lex loci*." The first is held by a great majority of Continental jurists, and is adopted in nearly all Continental codes. It may, therefore, be called the Continental theory. The second, which has, in fact, never been seriously propounded as a theory, but is the result of a sort of conflict between principle and convenience, in which convenience has gained the upper hand, has found its chief advocates in America, and is stated by Story, Westlake, and Phillimore to be the one recognised in the English Courts, though they confess there is very little authority on the subject. The third theory was first propounded by Hertius, in 1688, and was adopted by Meier who wrote in 1810, and Mittermaier, and lastly by Wächter in four articles published in 1841 and 1842 in the

“Archiv für Civilistische Praxis.” It may be stated more fully as follows: The abstract legal qualities of a person (die rechtlichen Eigenschaften einer Person an sich) must be judged according to the law of domicil, but the rights and incapacities (Beschränkungen) which spring from the status by some other law. As to what that other law is, there is some difference of opinion among the upholders of this theory. At first sight there is a specious look about it, which tempts one to think that this is the true one, but like all half measures it has never met with any favour, and the simple objection to it stated by Savigny is convincing. The gist of his objection is that a status is merely a name for the set of rights and capacities which form it, and that it can have no abstract existence apart from its component parts. To give an instance: If the rights of a domiciled Prussian, aged twenty-four, and therefore a minor by the law of domicil, had to be decided upon in our law courts, the advocate of Wächter’s theory would say, “We will recognise your minority, but your rights and capacities as a minor must be governed by our law with regard to minors.” But Savigny points out that the term “minor” is merely a term which has accidentally been attached to a certain set of rights and capacities, and that to be consistent with the theory, other sets of rights and capacities, such as those of a French minor at sixteen, which have no specific name attached to them, should be judged, as regards their abstract qualities, by the law of domicile, but this is impossible, since the status has no specific name, and there is no status corresponding to it in other countries.

I may, therefore, leave the intermediate theory, and proceed to consider the conflicting claims of the Continental and the American views. The earliest exponents of the Continental theory seem to be Argentæus and Rodenburg, who wrote in the middle of the seventeenth century. They were followed by Huberus and by Boullenois, who published

a French translation of Rodenburg, with considerable additions, in 1776. Foelix held the same doctrines, except that he substituted the law of origin for the law of domicile; his editor, Demangeat, however, expressly limits the doctrine to domicile. Pardessus also takes this view, and, as I said before, the great majority of Continental codes are in favour of it. The French code merely says, with its grand Napoleonic air: "Les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pays étranger," but the uniform decisions of the Courts show that the same right is allowed to the foreigner in France, which is claimed for the Frenchman in other countries. The Austrian civil code has two regulations on this subject, which provide that the personal capacity of the Austrian subject shall be governed by the law of his domicile as to transactions in another country, and that the personal capacity of foreigners shall ordinarily be determined by the laws of the place to which the foreigner is subject by virtue of his domicile. Belgium, Italy, and some of the Swiss cantons take the same line. In the Prussian code we find "The personal qualities and capacities of a man are judged by the positive laws of the jurisdiction under which he is properly domiciled;" and "Subjects of foreign states, who live or carry on business in these lands must be judged according to the preceding rule." But the Prussian code has also the following provision: "A foreigner who enters into contracts in these lands concerning things therein situated, is judged in respect of his capacity to act according to those laws by which the transaction may best subsist." This rule, Savigny informs us, is a purely positive one, laid down with the view of protecting subjects against the consequences of an innocent error, perhaps even of the dishonesty of their adversary. The most philosophic and consistent exposition of the Continental theory is to be found in the last volume of Savigny's great work, which was published in the year 1848. As I have mentioned before,



he rejects Wächter's division of status, and with the exceptions discussed above, adopts the law of domicile as the only true criterion of personal capacity. It is objected by Wharton that the exceptions he allows reduce his theory to little more than a declaration that no law obtains within a country except that which that country itself contains. But I cannot agree with this objection, for the reasons I have given; the exceptions seem to me to come under one simple head and to be perfectly consistent with the true spirit of Private International Law.

The most recent supporter of the Continental theory is Dr. Bar, an Assessor of the Royal Court at Hanover, in his "Internationale Privat-und Strafrecht," published in 1862.\* He, however, is of opinion that when a person is of full age by the "lex loci actus," a *bonâ fide* transaction with him should be sustained. This seems to be an important exception, and to be identical with the provision in the Prussian code. I shall endeavour to show hereafter that both are perfectly consistent with the domicile theory, and that they by no means amount, as some writers have supposed, to an adoption of the opposite theory.

Mr. Patrick Fraser in his "Parent and Child," apparently following Bar, also makes fraud an element to be taken into account. He gives his adhesion to the Continental view, and says that though there is a *dictum* of Lord Meadowbank in favour of the "*lex loci contractûs*," the Scotch law is now tending the other way.

The other writers who take this side are Phillimore, Westlake, and Livermore, who, in an instalment of a work on Private International Law, which he did not live to complete, criticises the judgment of the Louisiana Court in *Saul v. His Creditors* in most severe terms.

I now come to the American theory, that personal capacity to contract must be decided by the "*lex loci con-*

\* I have not seen Dr. Bar's book. Wharton and Fraser speak of it in terms of the highest praise.



*tractus*." In the first place, there is a little difficulty as to what is meant by the "*locus contractus*." If it is taken in the old sense of the term, viz., "*locus celebrationis*," the place where the contract is made, the theory must be limited to contracts which concern things situated in the country where the contract is made. It is in this sense that Mr. Foote understands it, but he does not make the necessary limitation. Does he seriously contend that an English Court of Law would declare that a contract entered into in this country between an Englishman and a foreigner, concerning something situated in the foreigner's country, was valid, if there the contract would be declared null and void, and consequently it could not be enforced? But now that Savigny has so clearly pointed out that the true seat of a contract, in all cases in which a place of fulfilment is fixed, is the place of fulfilment, it seems better to take the "*locus contractus*" in this, its proper sense of "*locus solutionis*."

The American theory seems first to have taken shape in the celebrated case, to which I have already alluded, of *Saul v. His Creditors*, in which it was gravely stated by the Supreme Court of Louisiana that they would recognise the personal disability of a foreigner in a case of minority, when it was contrary to their own law on the subject, if such recognition helped to sustain a contract with an American citizen; but if it had the opposite effect, they would refuse to recognise it. Phillimore justly characterises this conclusion as monstrous, Livermore criticises it most severely, and even Story says that it seems to stand upon mere arbitrary legislation. In an earlier case in the same Court it was stated that, according to the law of nations, "personal incapacities, communicated by the laws of any particular place, accompany the person wherever he goes. Thus he, who is excused from the consequences of contracts for want of age in his own country, cannot make binding contracts in another." But this is at variance with later

decisions on the point ; and ever since the case of *Saul and His Creditors* the doctrine there enunciated may be taken as the law of America.

Among the Continental codes we find that the code of Baden, while adopting the rule of the French code, makes an exception as to all questions relating to contract ; that the Dutch code provides that the Dutch laws relating to the status shall bind the Dutchman in every other country, but that the foreigner, resident in Holland, shall be subject to the Dutch law only, and not to the law of his domicile. The Russian code has similar provisions, as had apparently the code of the Two Sicilies ; but it is needless to point out that such rules have nothing to do with any principle of comity, and are almost tantamount to a repudiation of the whole system of Private International Law by the country enacting them.

If we turn to the text books, we find that the chief supporters of the American theory are Burge and Story, but we shall see that Story's support is somewhat weak and wavering. Burge relies on the Louisiana cases, quotes Grotius and Lord Stowell to the effect that a man who contracts in a foreign country is bound to know the law of country, says that the decisions in the Courts of England, Scotland, and the United States adopt this *lex loci contractus*, and sums up with an appeal to the argument of convenience. " This doctrine," he says, " promotes, whilst that to which it is opposed is inconsistent with those principles of mutual convenience which induce the recognition of foreign laws. The obstacles to commercial intercourse between the subjects of foreign States would be almost insurmountable if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicile of the person with whom he was dealing, whether the latter has attained the age of majority, and consequently whether he is competent to enter into a valid and binding contract." To this part of Mr. Burge's

argument I would reply, that it is just as easy to ask a foreigner, with whom you are going to contract, whether he is "*sui juris*" by the law of his domicile, as it is to ask him his age, and that, in both cases, it is equally difficult to ascertain the correctness of his answer, for it cannot be predicted that he is more likely to have in his pocket his baptismal certificate than a copy of the code of the land in which he is domiciled. With regard to the quotation from Grotius, which is that "if a stranger makes an agreement with a citizen, he is bound by the same laws; because he who makes a contract in any place is under the laws of the place as a temporary subject," I would remark that Grotius himself points out that the promises of minors have nothing to do with the "law of nature and nations," thereby implying that they have nothing to do with his subject. In fact Grotius wrote while the whole system of comity was yet in its infancy, and he naturally does not take into consideration a system which is founded on the assumption that not only the law and morality common to all nations should be recognised in Courts of any nation, but also the positive laws of each nation provided they do not come into conflict with the "*jus naturæ et gentium*."

When I turn to Story I find that in the main he is agreed with Burge that the *lex loci contractûs* is adopted in questions of capacity in England and the United States. But his own opinion on the subject is by no means clearly stated. As I said above, he thinks the case of *Saul and His Creditors* stands upon arbitrary legislation, and in one place he says that a nation should adopt some definite rule on the subject. He apparently however cannot make up his mind which rule it should be, and perhaps the following words may be taken to be his real view of the matter: "The truth seems to be that there are, properly speaking, no universal rules by which nations are, or ought to be, morally or politically bound to each other on this subject. Each nation may well adopt for itself such modifications of the general

doctrine as seem most convenient, and most in harmony with its own institutions, and interests, and policy." This seems tantamount to a confession that the learned judge is utterly puzzled, and in fact it is properly pointed out by Wharton, in his "Conflict of Laws," that Story laboured under the disadvantage of writing without the information of the views of Wächter, Savigny, or Foelix.

The authorities on the subject are very well stated by Wharton, but with his own theories I cannot agree. He adopts a solution of the difficulty based on the position that statutes which destroy capacity are disfavoured internationally, while those which protect capacity are favoured. Among the statutes which destroy capacity he puts those which establish slavery or civil death, and those which impose disabilities upon persons of full age, while as instances of the other class, he mentions those which restrain infants and married women. He then discusses in detail all the different kinds of incapacity, and when he comes to infancy, lays down the following rule: "In respect to infancy by the natural law the question does not admit of doubt (*i.e.*, that the *lex domicilii* must decide). But it is different when infancy approaches that period as to which particular countries, following climate or tradition, have attached various bounds." His theory, therefore, with regard to infancy seems to be this: Up to the age, which by the law of nature is full age, personal incapacity must be judged by the law of domicile, because it imposes this incapacity in order to protect capacity. On the other hand, in questions concerning persons who have passed this natural majority, the law of domicile must be rejected, because it imposes incapacity for the purpose of destroying capacity. This sounds very like nonsense, but, as far as I can make out, it is what Wharton contends for as the true solution of the difficulty. The notion of an imaginary age, which the natural law has settled to be the age of majority, is ridiculous. Natural law, meaning the law of God, has nothing

to do with the question; and if by natural law Wharton means the positive morality common to all nations, we get no further than this, that by this law persons of twelve are minors, and persons of thirty are majors. The imaginary border line is, therefore, rather a wide one. I would also point out that statutes in restraint of minors and married women destroy capacity just as much as any other statutes which impose disability. The difference between the two classes is, that the one especially aims at destroying the capacity for incurring duties, while the object of the other is to destroy the capacity for taking rights.

I am now brought to a consideration of what the English law on the subject is. Mr. Foote states it in the following form: "When the *lex loci* of an act or of a contract competes with the *lex domicilii* of the person with regard to his capacity, the former prevails." Story and Westlake both say that, according to English law, the *lex loci contractus* must decide questions of personal capacity, but Westlake admits that the array of authority on the subject is very weak, and that the argument derived from questions of capacity to marry has been much shaken by the decision in *Brook v. Brook*. Phillimore's remarks are still stronger. He says: "The state of jurisprudence presented by the practice of the English and American tribunals upon the question of the personal status of foreigners will be found very unsatisfactory, whether it be considered with reference to comity, as being at variance with the law of the rest of the Christian world, or with reference to its own domestic jurisprudence, being marked by painful and clumsy inconsistencies." Mr. Fraser, who seems to have forgotten what he had previously written in his "Parent and Child," criticises Lord Justice Cotton's *dictum* to the effect that the learned judge was not aware that the old doctrine (*i.e.*, that the *lex domicilii* must decide) was abandoned as an impracticable one, and that his decision ignores the judgments which sustained the marriages of English minors in Scotland, and

is in direct contradiction with the judgment of Sir Cresswell Cresswell in *Simonin v. Maillac*. Mr. Foote likewise protests that "If it is 'a well-recognised principle of law' that the law of domicile is to exclude the law of the place of contract, it has become so since Story wrote and since Lord Eldon sat at Nisi Prius."

Mr. Foote here alludes to the case of *Male v. Roberts*,\* which is, perhaps, not so celebrated as it deserved to be, for it is upon this solitary case that American writers have been kind enough to build up for us a theory which English writers, though not without some murmuring, have been weak enough to accept as a true enunciation of English law. And so when a judge speaking in the name of the Court of Appeal, states what the real law is, there is an immediate outcry that he is unsettling the law. It seems to me that if the statement in question had been a decision on the express point, and not a mere *dictum*, which (though Mr. Foote seems to forget this) cannot alter the law one hair's breadth, it would rather have been entitled to the merit of settling the law.

But to consider the case of *Male v. Roberts*. It is a very simple one. The defendant was a performer in a circus at Edinburgh; he became indebted for *liquors of different sorts*, and was arrested; the plaintiff paid the money for him, and the defendant refused to repay him. The action was brought to recover the money, and the defendant pleaded that he was an infant when the money was advanced to him. Lord Eldon said that the law of the country where the contract arose must govern the contract, and that consequently the defendant must show that infancy was a good defence by the law of Scotland. The plaintiff failed in proving his case, and was non-suited.

Where is the principle laid down here, that the question of personal capacity must be decided by the *lex loci contractûs*? There is not one word in it about capacity. The

\* Rep. 3 Espinasse's Reports, p. 163.

case is not well reported, for it is not clear what it was that the plaintiff failed to prove, the facts or the Scotch law. Again, the counsel for the defendant stated, as if it were settled law, that the contract was not for necessities, and was not binding by English law, but in a case before Lord Alvanley, a year or two later, the learned judge distinctly ruled, that money paid for an infant to stay execution could be recovered. But taking the case as it stands, as a decision that the validity of a contract must be judged by the *lex loci contractûs*, is not this quite distinct from the proposition that the capacity to contract must be decided by the same law? The validity of a contract certainly depends upon capacity, amongst other things. "Four conditions," says the French code, "are essential to the validity of a contract: (1.) consent; (2.) capacity to contract; (3.) a certain object; (4.) a lawful cause or consideration." And further on we find that the persons incapable of contracting are minors, "les interdits," and in certain cases married women. Thus it follows that contracts of these classes of persons are invalid. But what is an invalid contract? It is not a *void* contract, that is, a contract which has never existed at all—a nullity. It is merely a *voidable* contract. And here, let me remark, that many English text-books show a remarkable oblivion of the important difference between void and voidable contracts, and that this looseness of expression has been the source of much confusion. "A voidable contract," to quote Mr. Pollock, "will have all its proper legal effects, unless it is disputed and declared invalid. And it can be disputed only by certain persons and under certain conditions." To return to the French code: Art. 1125 says that minors can only dispute their engagements on the ground of incapacity in cases provided by the law, and Art. 1305 tells us that all contracts may be rescinded in favour of a minor on the ground of injury (*lésion*). On the other hand, persons, "*sui juris*," who contract with minors, cannot repudiate the



contract on the plea of the minor's incapacity. We thus arrive at the following result: There are certain classes of contracts in the French law, which are *primâ facie* invalid, but which, as no one has a right of disputing them, have exactly the same effect as contracts which were valid from the beginning.

If we compare the English law on the subject, we shall find a very similar result. By our law a minor is incapable of contracting. His contracts will, however, be declared valid, if they appear to the Court to have been for necessities, or, in some cases, for his benefit generally. We too, therefore, have a class of contracts which are *primâ facie* invalid, but which the Court will declare to be valid. Moreover there is a rule in Equity, that if a minor has obtained a benefit on the faith of a representation that he was of full age, he is liable to the extent of that benefit. This is tantamount to saying that in such case if the minor has got his benefit, and is unable to restore it, he must pay for it. It is not an obligation to perform a contract, it is merely the application of a principle of common sense and justice, that an infant shall not take advantage of his own fraud. It is not a law of contract, but a law of procedure which the Courts of any country have the right to apply to all persons who sue in them.

The preceding remarks will, I think, show the correctness of my assertion that the case before Lord Eldon had nothing to do with personal capacity. The infant was equally incapable of contracting by the law of England and by the law of Scotland; the only question was whether the infant had a right to repudiate the contract, and that, said Lord Eldon, must be decided by the *lex loci contractûs*. The only direct authority therefore for the statement that the capacity to contract is in English law determined by the *lex loci* turns out to be no authority at all. Mr. Fraser refers to the decisions on the marriages of English minors in Scotland. Now no one contends more strenuously than



this learned writer that marriage is not a contract at all. Therefore it is hardly consistent of him to quote decisions on the validity of marriages as an authority on the question of a contract. But assuming that there be some analogy, I would refer Mr. Fraser to Lord Campbell's judgment in the celebrated case of *Brook v. Brook*, where he says that Lord Hardwicke's Marriage Act does not touch the essentials of the contract, but only regulates the formalities. With regard to the case of *Simonin v. Maillac*, which was the case of a marriage between French minors to which the necessary consents had not been given, and which in *Sottomayor v. De Barros* is explained in the same way, namely, that the consent must be considered part of the ceremony of the marriage, I would venture to submit that it might be put upon another ground; that the French code, although it declares certain persons incapable of contracting marriage without the consent of their parents or guardians, says that such a marriage can only be disputed by certain persons and upon certain conditions. In other words, it is a voidable and not a void contract, and its validity must depend upon the *lex loci contractus*. I, however, entirely agree with Mr. Fraser, that marriage is not a contract, and therefore that on the question of a true contract all arguments derived from the laws of marriage are apt to mislead us.

On the whole, then, it appears that the proposition, which so many writers have stated to be English law, is not supported by the authority either of judges or jurists. Perhaps Lord Justice Cotton went a little too far in saying that the principle he laid down was a well-recognised one, but if he had said, "It is a well-recognised principle of Private International Law, and there is no authority which prevents our applying it as English law, that the question of personal capacity to enter into any contract is to be decided by the law of domicile," the statement would have been perfectly correct. Of course, a statement by the Court, which is merely an enunciation of a principle of law,

and not a decision on a question of fact, does not, theoretically, make any alteration in the law; but, if the words of the learned judge should lead to a recognition that our law is not at variance with that of nearly the whole of Europe on this not unimportant point of International Law, they are worthy of being printed in characters of gold.

But though it is advisable that on all questions of comity this country should be in harmony with other civilised countries, it is quite conceivable that, in some cases, their rules might cause such inconvenience and injustice to our own citizens that it would be necessary in self-defence to adopt a different rule. It is this view which seems to have influenced the American Courts in their decisions on the contracts of foreigners. The arguments of their judges, and of all writers who follow in their footsteps, against what I have called the Continental theory, may be roughly classed under two heads — (1) Inconvenience; (2) Injustice.

As regards the first head, I have already said that it seems to me just as easy to find out whether a man is *sui juris* by the law of his domicile as it is to find out his age. In all cases of contracts with minors, whether they be Englishmen or foreigners, there must be some difficulty and some risk. Persons do not have their ages stamped upon their faces, and an Englishman of twenty may look just as old as a Prussian of twenty-four, and be just as much of a man to the unsuspecting tradesman. The fact is, that in executing contracts neither rule would cause any inconvenience to persons who take proper precautions, while in contracts for the immediate sale of goods, and such like, the Englishman must depend to a great extent upon the honesty of the foreigner.

The argument of injustice is equally irrational. It is said that it is manifestly unjust that a Prussian of twenty-four should decoy a guileless Englishman into a contract, and then repudiate it on the plea of infancy. In answer to

## II.—THE CAPITULATIONS OF LESSER ARMENIA.

IN dealing with the question of the Capitulations, or Exterritorial Privileges, of the Christian Nations of the West in the Ottoman Empire,\* we showed their antiquity as between Christian and non-Christian Governments. The jealousy with which the Western Nations, the heirs of the Roman Law, have guarded their juridical heritage even among Christian peoples in the East, affords at once a striking illustration of the abiding and overmastering influence of that great legal system, and a testimony to the differences of thought and culture which have kept the two streams apart, even where they might have been supposed most likely to mingle.

We propose giving a glance, in our present paper, at a portion of this field of enquiry, which we have reason to think but little trodden by Western Jurists, viz.: The Privileges obtained by the Genoese merchants in the Christian Kingdom of Lesser Armenia in the thirteenth and fourteenth centuries. The fact that the Kings, who conferred these Privileges, were themselves Christians, gives a special interest, it appears to us, to this Chapter of Legal History. It would constitute a very strong argument in favour of the existence of Capitulations as between the Western Nations and the early Ottoman Sultans, if our knowledge of their contemporaneous existence were not beyond doubt. And it does seem to us also to furnish something of an answer to the incompatibility which has been supposed by some to exist between a quasi-British rule in Cyprus, and the right to claim the non-desuetude of the Capitulations hitherto unquestionably in force in the dominions of the Ottoman Lord of the Isle of Cyprus.

\* *Law Magazine and Review*, No. CCXXX., Nov., 1878, Art. "Law in Cyprus;" No. CCXXXI., Feb., 1879, Art. "Cyprus and the Capitulations."

If Christian Kings in the Middle Ages could concede the many privileges which we are about to describe, amounting practically to an "Imperium in Imperio," why cannot more modest demands be allowed by a British Colonel, even when disguised under the temporary grandeur of a "High Commissioner?" The Armenian Capitulations are certainly among the earliest of which we can trace the history. "They afford," says M. Langlois, in a learned Dissertation read by him before the Royal Academy of Turin,\* to which we are indebted for drawing our attention to this subject, "the model of the most ancient Capitulations which have governed Europeans in the East." At a time when we are, outwardly at least, commencing to bestir ourselves in the matter of the serious responsibilities which we must be held to have undertaken under our vaguely defined Protectorate of Asia Minor, the story of the relations which existed some four or five centuries ago between Italian merchants and Cilician Kings can hardly fail to present some points of interest and instruction. The legal question, moreover, must very soon force itself to the front. What law, it may well be asked, will be administered in Asia Minor, under the sheltering ægis of Great Britain? Will it be the Law of the Koran, or the "*indigesta moles*" of the English Common Law? Shall we recognise any substantive existence of a National Law in the various subject communities, Greek, Armenian, perhaps also Georgian, and Persian, which are to be found scattered through the length and breadth of our new Protectorate? We want, it is presumed, to be the benefactors of Asia Minor—possibly also the patrons of a commerce and an intercourse between East and West that shall have a reflex action beneficial to our own commercial wealth. We want, it is presumed, to encourage and attract settlers, agriculturists, artisans, traders, and to revive the theory of a busy

\* "Memorie della Reale Accademia delle Scienze di Torino," Serie II., Tom. XIX. Torino. Stamperia Reale. 1861.

life where stagnation and decay have hitherto been the dominant features of once prosperous lands. This is, no doubt, an excellent and a philanthropic desire, but in order to bring it to fruition it is very certain that we must assure life and liberty, and the security of the person alike from the Kurdish marauder and the Turkish zaptieh. Let us now see how the Rupenian dynasty of Armenia set about the task of winning the confidence of Western traders and Western settlers at the period of greatest intellectual activity of the Middle Ages. The Capitulations were already an established fact at the close of the twelfth century: they were renewed and revised at different periods during the thirteenth and fourteenth centuries. The chief points common to all the revisions seem to have been the following:—1. Arrangement of the Customs dues to be exacted on foreign goods; 2. Settlement of the right of wreck; 3. Rights of testation, and succession ab intestato; 4. Civil and Criminal Procedure; 5. The Law of Status.

Before any of these Privileges were granted, the Kingdom of Lesser Armenia had been organised on the full feudal system of Western Europe, or rather perhaps even more closely on the lines of the Latin Kingdoms of Cyprus and Jerusalem, and the Principality of Antioch, in a feudalism of which we have recently gained a fuller insight through the publication by the Armenian monks of S. Lazzaro, in Venice, of the "*Assises d'Antioche*."\* It is specially interesting to note that Sempad, "the servant of God, Constable of Armenia, and Lord of Paparon, son of Constantine, and brother of Hethoum, the pious King of Armenia," who was unquestionably the translator into French of the "*Assises of Antioch*," was living at the time of the principal Capitulations granted by the Kings of

\* "*Assises d'Antioche, Reproduites en Français et Publiées au 6<sup>me</sup> Centenaire de la Mort de Sempad le Connétable.*" Venise. Imp. Arménienne, 1876. (Noticed in the "*Revue Générale du Droit*." Paris, Thorin, for March-April, 1877, by M. Joseph Lefort, Laureate of the Institute.)

Lesser Armenia, to the merchants of Genoa and Venice. In these Assises we find discussed most of the various questions regarding the relations between the lord and his vassal, which could have arisen in feudal Europe; *e.g.*, how the vassal is to be punished for leaving his lord without permission, how the lord may seize the goods of his vassal, and other such "questions brûlantes" of feudalism. In Antioch, as in Lesser Armenia, we find the civic and commercial elements holding a prominent place. Besides the "Assises de la Haute Cour" we have also the "Assises des Bourgeois," in which are considered questions of the Law of *Status*, and therein "first of all of the marriages and alliances of burgesses and merchants, because of such marriages and alliances spring the beginnings of every kind of increase." This "increase" leads the compiler of the "Assises of Antioch" into the discussion of many branches of Law—Civil, Commercial, and Criminal. We hear of criminal suits for wounding and for homicide, both as between men of the same blood and strangers; we also hear of taking cases concerning Patrimony into Court, and concerning the sale and hypothecation of Patrimony, the lease of houses according to the Assise, or according to the usage of Antioch, the law of weights and measures, the buying and selling of bankers, and the traffic of merchants in imports and exports, according to the laws and usages of Antioch.

From this brief conspectus of the importance of mercantile affairs in the Principality of Antioch, we may judge of the strength of the reasons which induced the Kings of Lesser Armenia to grant very extensive privileges to Western merchants establishing themselves in the Ports of Cilicia. Of these privileges there seem to have been two classes, those accorded to what we may call the most favoured nations, such as were enjoyed by the Genoese and Venetians, and those which were deemed sufficient for nations whose traffic was occasional or limited, as was the case with the

Pisans, Catalans, Sicilians, and the men of Provence. The former class had permanent settlements of the most extensive character, including churches, as well as shops, and factories, and warehouses. The existence of separate churches, or what we should now call freedom of worship, was doubtless a necessary corollary to the establishment of factories, although the Rupenian dynasty itself had made act of submission alike to the Western Church and the Western Empire, in accepting the Royal title from the Emperor with the assent of the Pope. Such, at least, is the language of M. Langlois. Prof. Bryce, in the interesting, though unfortunately very brief, summary which he gives of "Imperial Titles and Pretensions," chap. xii. of his "Holy Roman Empire" (1866), simply states, without any details, that "the Kings of Cyprus and Armenia sent to Henry VI. to confess themselves his vassals and ask his help." That the King of Cyprus, rather loosely described as "up to that time a feudatory of the Eastern Roman Empire," was crowned "as a feudatory of the Western Empire" by Conrad, Bishop of Ildesheim, Chancellor of the Empire, in September, 1197, is mentioned in De Cherrier's "*Lutte des Papes et des Empereurs de la Maison de Souabe*" (Paris, 1841, Vol. I., p. 485.) The King so crowned, however, who was Amanry de Lusignan, brother of Guy of Jerusalem, had never been a feudatory of the Byzantine Empire, and the Latin Kingdom of Cyprus had been created in his favour by the Emperor, Henry VI., on his petition and homage at the Imperial Diet at Gelnhausen, in 1195. (Huillard-Bréholles, "*Historia Diplomatica Friderici Secundi*," Paris, 1859, Intr., p. 333.) Now Henry VI. died on the 28th September, 1195, and M. Langlois refers the acceptance of the Royal title by Leo II. of Armenia to the year 1199. It would seem, therefore, that although the King of Cyprus may have been crowned, as he certainly was invested by transmission of the sceptre (conveyed to him by the Archbishops of

Trani and Brindisi, Huillard-Bréholles, *op. cit. ib.*) while as yet Henry was alive, and at any rate was crowned in his name and by his authority, exercised through his Chancellor: the confirmation of the Armenian crown must have been due to another Emperor than Henry VI., and another Pope than Cælestine III. The Catholicos of the Armenians who received a Pallium in 1239, must have brought a certain portion at least of his flock into the Roman Communion. But their maintenance of an independent spirit is shown by the fact that the Catholicos entreated Innocent III. to absolve Frederick II. from the excommunication pronounced against him at the First Council of Lyons. Yet we do not know that the people generally followed their Kings to any appreciable extent. Whether the history of the Latin Armenian Church, the internal division of which into Hassounists and Kupelianists, partly due to the ecclesiastical events of 1870, seems to have been lately healed by the reconciliation of Mg. Kupelian, can be traced back by documentary evidence in unbroken succession to the period of the Crusades, we are not able summarily to decide. But even if there was, as we believe to have been the case, a small Armenian community which went with its Kings in acknowledging the Bishop of Rome as the Divinely appointed Centre of Unity, and Universal Bishop, that community, with the tenacity of national sentiment always manifested by the Armenian race, would doubtless make the liturgical maintenance of the national language a "sine quâ non" of its accession to Roman Communion. That would in itself have constituted a valid reason for the demand of separate churches on the part of the foreign settlers, though we incline to think that it was in the main a theological and not simply a linguistic necessity. We content ourselves, therefore, with stating the fact, without claiming it as an example of tolerance rare among the Kings of the Earth, whether in East or West, for many centuries after the days of Leo II. of Armenia.



Tolerance alone, however, would not have satisfied the Republic of Genoa in any matter which was capable of being secured by Law. In the year 1200 we find the Republic sending a fleet and an Admiral (not a very pacific style of Embassy) to Lajazzo, the principal port of the Kingdom of Sis, to demand of the King that the privileges which had hitherto been enjoyed by the Genoese in the way of Comity should now be placed on the firm footing of Convention, signed by the King's sign-manual, and sealed with the Royal Seal. Three different Charters are known to us, embodying the privileges accorded to the Genoese by the Kings of Lesser Armenia. In the first, a Chrysobullum of the year 1201 of our era, which followed on the embassy of Niccolò Doria, Admiral of the Republic, with a strong fleet, Leo II., "Rex Armeniorum, filius Stephani et de potenti genere Rupinorum," raised to the Royal dignity by the Empire and the Holy See, grants the following rights to the subjects of the Republic, "Assensu Curiae Regalis."

I. Freedom to come and go throughout the Kingdom, to buy and sell, to enter and leave the ports.

II. Abolition in their favour of Customs rights (*i.e.*, as we shall see later, of the *ad valorem* dues, not of the fixed Customs dues of the Kingdom).

III. Abolition of the right of wreck.

IV. The concession of land at Sis, Mopsuesta, and Tarsus, for the building of Hospices (Fondachi), houses, churches, &c.

V. The creation of Courts in the above-mentioned towns.

VI. Protection for the Genoese (*i.e.*, we presume, in feudal language, extending the King's peace to them), and the abolition of the right of search (*tzerca*, query Italian *ricerca*?), explained as meaning the dues exacted by the Treasury on the restoration of stolen goods.

This Bull, which is in the Archives of Genoa (Liber Jurium, Tom. I., fol. 231), was drawn up by the Chancellor

of the Kingdom of Armenia, John, Archbishop of Sis, Abbot of Trazarg (Trium Arcuum Abbas), subsequently Patriarch as John VII., or the Magnificent. The Kings of the Rupenian dynasty seem to have used the tribal and territorial forms of kingship indiscriminately. In the Capitulation of 1201, Leo II. calls himself, as we have seen, King of the Armenians (Thakavor Haïotz). In the Capitulation of 1215, the same Monarch styles himself "Rex Armeniæ," while in a Draft Capitulation of 1283, his successor, Leo III., calls himself King of all the Armenians. Some justification of our suspicion of "vis major," or at least that amount of pressure which the presence of a fleet of ships of war has been known to exercise in modern times, may be found, we think, on a comparison of the Capitulations of 1201 and 1215. In the former, Leo II. granted an unlimited extra-territorial Judicature to the subjects of the Republic of Genoa in Lesser Armenia. At that time Niccolò Doria's fleet lay at anchor in the waters of Lajazzo. In the latter, when we are not aware of the existence of such powerful arguments in favour of concession, the same King reserved to himself cases of robbery and murder, which were to be justiciable in the High Court (Curia Regalis) of the Kingdom. The later Bull also goes into more detail in a matter which had been left somewhat indeterminate in 1201, viz., the question of the dues which the great feudatories of the Kingdom—the Barons of Tiberias, the Lords of Gorigos, and others—were in the habit of exacting on merchandise passing through the defiles of Mount Taurus, which were wont thus to become a source of profit to these lords of the mountain-gorges. Over these passes the King had no rights, and could therefore grant no concessions, until any of the fiefs in question reverted to the Crown, in which case the King promises to exempt the Genoese merchants from payment. Like his brethren in feudal Europe, the King of all the Armenians found his power limited by his great vassals.

He had sought to make himself a position as like as possible to that of a Western Monarch. Perhaps he found that in his success he had created for himself a Frankenstein, in the shape of numerous vassals who were quick to seize on all the points in the Feudal system which they could turn to their own advantage. The next Capitulation with which we are here concerned (that of 1288), seems not to be more than a draft presented by the Armenian King for the consideration of the Republic, for although it is signed by Leo III., it does not appear to be a Chrysobullum; and a Genoese Ambassador, Benedetto Zakaria, the same who had received from Leo the Draft of 1288, returned the following year to Sis with fresh demands. But he found Leo III. dead, and his son, Hethoum II. reigning in his stead. It does not appear that the second embassy was successful, and indeed the disturbed state of the Kingdom of Armenia was not likely to leave the King much time to discuss the affairs of foreigners. From this time it appears probable that the Genoese contented themselves with standing on the privileges which they had already secured, without attempting to add to them. And as it is clear that the Diploma of 1288 represented what Leo III. of Armenia was willing to grant in the way of extra-territorial privileges to the subjects of the Republic of Genoa, though it would seem that these concessions, ample as they were, did not satisfy the desires of the Republic to their full extent, we shall be warranted in considering that Diploma as presenting a fair picture of the ex-territoriality conceded by an Eastern Christian monarch to Western Christians at the close of the period of the Crusades. The age of St. Louis and of Edward I., of Dante and of St. Francis of Assisi, is also an age of constitutional and legislative progress. For it is also the age of Simon de Montfort, the true founder of our modern Parliamentary system, and of the Emperor Frederick II., whose almost life-long struggle with the Papacy, under some of the mightiest occupants of the

Roman See, has partially obscured his real glory as a Legislator, on many points far in advance of his own and several following centuries. Under these circumstances, the study of the Genoese position in Lesser Armenia, as it was conceded by the last King of the older dynasty who seems to have had any heart for encouraging Western traders and settlers, becomes a study of no small interest, and one which throws some light, we venture to think, on the history and attributes of the Consular office. We find the Genoese "Baile" (Ballivus), or "Kountz" (Consul), in the latter part of the thirteenth century, sitting in the Consular Court, which the Armenian King had allowed by the Capitulations of 1201 and 1215, with his "boni viri" and "probi viri" around him, and his "bastonarius," or Usher of the Court, to keep order. And as it appears that the Venetians employed such officials in the Kingdom of Sis some time before the Genoese, we should probably be justified in carrying back the history of Consuls, in the more modern sense of the term, to the twelfth century.\* Down to A.D. 1215, the Genoese Consul, at least, had jurisdiction over all cases arising among his countrymen, but in the Capitulation of that year, as we have mentioned, cases of robbery and murder were reserved for the King's High Court. In the Privilege of 1288, which we hesitate to call a Capitulation, because it is not certain that the Genoese Republic accepted it, there was a provision regarding the duties of the Consul very much akin to some of his later functions. It was therein enacted that the Consul (Kountz) should verify the nationality of the subjects of the Republic, and certify it to the King's officers. There can be no reasonable doubt, though we cannot bring forward proof "*currente calamo*," that the Venetian Consul, who

\* Pierantoni quite takes this view, and instances the very early Capitulations of Amalfi, and the existence in Italy and Sicily of Consuls from the cities of Narbonne, Arles, Montpellier, &c. (*Storia del Diritto Internazionale*. Napoli. 1876.)

was earlier in the field, was charged with a similar function. This comes to something very like the Consular Passport, or Tezkereh, so much sought after in the Levant in modern days, and prevalent to a considerable extent on the Continent of Europe before the cheapening of the Foreign Office Passport.

The Privilege of 1288, from which we cite this statement of the Consul's duties, is interesting also on other grounds. It is the only one in which the Succession Law established as regards aliens dying in Armenia can be clearly traced. The doctrine here laid down was that the property of a Genoese dying in the Kingdom, intestate, should revert to his countrymen, *i.e.*, we presume, to his next-of-kin, and failing them, to the Republic. As regards a Genoese who should have married an Armenian woman, property coming through her was to revert to the Armenian Crown if her husband, having survived his wife, died intestate or without next-of-kin.

From the Privilege of 1288 we also learn some further facts concerning the Customs dues of Lesser Armenia. It would seem that these were of two kinds—fixed and “*ad valorem*.” For we read that the former were by this Diploma abolished in favour of the Genoese, while the latter were fixed according to a scale given there. The old vexed question of the dues exacted on goods passing through the defiles of Mount Taurus reappears here, one of the provisions being for the definite settlement of the dues at the defile of Gouglag. In the attempt which was made by the Genoese the following year to get some further privileges conceded, they asked for the abolition of dues on goods exported from Armenia into the neighbouring Mohammedan States, the Seljuk Sultanate of Khonieh and the Turkoman Emirate of Cappadocia, known to the Armenians under the generic name of “*Turchia* ;” but we do not know what answer, if any, was made to this demand by Hethoum II. It is safer, therefore, to picture to our-

selves the legal position of the Italian traders and settlers in Lesser Armenia as we know it from indisputable documents. We have seen that Eastern Christians granted to Latin immigrants every privilege of extraterritoriality of justice and worship which a Christian State could have desired for its subjects in a Mohammedan country. We have seen that Western Consuls were judges of extraterritorial Consular Courts as far back as the Thirteenth Century. We may well ask whether some such arrangement would not be the simplest and readiest mode of initiating the long-promised Reforms in our new "Protectorate" of Asia Minor.

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### III.—FOREIGN JUDGMENTS.

WE remember a quaint story of a somewhat too liberal priest—possibly a Gallican, in days when as yet Gallicanism had a substantive existence—who, on being gently reminded that he was bound to interpret Scripture in accordance with the decrees of the Councils, and the "*unanimes consensus Patrum*," observed, with a delicate irony, "*Ah, Patres! vastissimus campus!*"

Our own feelings are very similar as we enter upon the wide field of Foreign Judgments, of which, indeed, in our present article we can hope to touch but a small portion. The subject is one of which the importance has been growing with the increase of international relations in every sphere of life, juridical, political, commercial, social, throughout the civilised world. It has been taken up, as was natural, primarily by those nations, both in the Old and New World, whose laws have a close common tie in their common descent from the Fountain of Western Juris-

prudence, which forms the general scientific basis of the Codes of all the so-called Latin Races. Slightly touched on by Heffter, and at somewhat greater length by Calvo, it has formed the subject of separate treatises by an eminent living Italian Publicist and Professor, Pasquale Fiore.\* It has been kept before the juridical world of Western Europe by learned writers, of various countries, in the pages of our excellent contemporaries, the "Revue de Droit International," of Ghent, and the "Journal de Droit International Privé," of Paris. It is classed as one of the indirect means of the manifestation of International Law by one of the most recent of South American Publicists, Sr. Almancio Alcorta,† Professor in the University of Buenos Ayres, and it formed the subject of Resolutions passed by the recent Congress of Spanish-American Jurists, held at Lima, in 1878, with the view of putting an end, as far as might be, to that Conflict of Laws which, notwithstanding their well-intentioned efforts, seems likely still to hold its ground and tax the energies of future generations of judges and advocates in all lands. In our own country we have a recent work, by Mr. J. Alderson Foote,‡ and a still more recent contribution to the literature of this branch of jurisprudence has been made by Mr. F. T. Piggott,§ to whose useful and well-timed volume we shall, for the present, refer our readers who wish to find in a convenient form the cases establishing the doctrine and practice of the English Courts in the matter of Foreign Judgments.

There being two broad divisions of our subject, the Civil and the Criminal, we shall first consider the former. Any

\* *Effetti Internazionali delle Sentenze e degli Atti. Parte Prima. Materia Civile.* Pisa. 1875.

† *Tratado de Derecho Internacional.* Tom. 1. Buenos Aires. Biedma. 1878.

‡ *Private International Jurisprudence.* Stevens & Haynes. 1878.

§ *Foreign Judgments Their Effect in the English Courts.* Stevens & Sons. 1879.

recognition which is accorded to a Foreign Judgment, having first of all to be reconciled with the fundamental doctrine of the sovereignty and independence of States, we shall not be surprised to find some text-writers putting the case for such recognition rather mildly. Heffter,\* for instance, cautiously observes that "the principle of the sovereignty and independence of every nation has not so absolute and exclusive a character as to cause all laws and acts emanating from foreign sovereigns to be void of all authority outside the territory of such sovereigns." In regard to the examination of "communications emanating from foreign authorities," by which he appears to mean Foreign Judgments, he proceeds to lay down the rule that they are to be regarded as authentic, provided neither the competence of the authority, nor the authenticity of the document be called in question. And he adds that "no doubt the laws of a State may also give direct effect to a certain extent to Acts emanating from foreign authorities, at least on the express or tacit condition of perfect reciprocity." But he also distinctly lays down that "no State is *bound* to authorise the execution on its territory of Foreign Acts and Judgments." Such a position, indeed, flows directly from the fundamental principle, *Par in parem non habet imperium*. Calvo,† with less accuracy, as it seems to us, says, "The obligatory force which the legislation of one State may have on the territory of another depends on the express or tacit consent of the interested parties." We are here tempted to ask whether it would not be a dangerous principle to allow the "*obligatory force*" of a foreign legislation to be in any case dependent on mere "*tacit consent*?" And further, who, we may ask, are the "interested parties?" Surely, they are the several States, quite as much as the individuals who may be concerned.

\* Le Droit International de l'Europe. Par Bergson. 1873. Lib. I., ss. 34, 35.

† Le Droit International Théorique et Pratique. 1870. I., p. 352.



To say with Foelix, whom Calvo proceeds to cite with approbation, that when legislators, public authorities, Courts, and text-writers accept the application of foreign laws they are not acting "in conformity with a duty, or an obligation of which the fulfilment might be exacted, but *ex comitate*, and *ad reciprocam utilitatem*," seems to us a truism: nevertheless it is one which may as well be stated. It cannot be more than a question of comity, but it may well be also a question of interest, and it may be that interest is pointing in the direction of greater readiness in recognising Foreign Judgments.

Fiore\* considers there are four principal systems prevalent in the matter of this recognition, and that they are more or less strict according to the various modes of estimating the juridical relations between States, and the foundation for the authority of the judgments.

I. The first and "least liberal" system, he says, denies all effect to the sentences of foreign Courts, because it considers isolation as the rule of international relations, and considers the authority of the sentence, founded on the Civil Law of the country in which it was pronounced, to be as much territorial as that of the law itself.

Under this system, says Fiore, the Foreign Judgment comes to be considered either as non-existent, or as passing under review of the magistrate of the country where it is desired execution should be given, in which case he is of opinion that the authority of the *res judicata* is disallowed.

II. The second system, continues Fiore, while recognising that in strictness the authority of a judgment should be territorial, admits that a Foreign Judgment may, under reciprocity, be allowed efficacy for the common good (*utilità*), and by International Comity.

This is clearly Heffter's "*ex Comitate, ad reciprocam utilitatem*." Its force would depend, as Fiore goes on to

\* Op. cit. (Pp. 9-11.)

show, upon Conventions sanctioning the obligation of reciprocity, and might therefore be called the Conventional system.

III. The third system Fiore dismisses in a very few words as one which by sanctioning disparity of juridical condition even in this matter, between citizens and aliens, admits essentially different principles according as the Foreign Judgment is sought to be enforced against a citizen or an alien. We should perhaps not be far wrong, as regards Fiore's estimate, if we were to call this the "illogical system."

IV. The fourth system admits the extra-territorial force of a Foreign Judgment to the extent of allowing the *exceptio rei judicatæ* to be based upon it. But as regards the executory force of such a sentence this system does not allow equal weight to the judgment of a foreign Court and to its own, though it allows the local magistrate to decree the execution of a Foreign Judgment, if it possesses all the legal guarantees which may rightfully be demanded before such execution be conceded. This system Fiore allows to be at once the "most rational and liberal," yet it is one under which many questions may and do arise concerning the conditions for admitting the authority of the Foreign Judgment, as well as concerning the conditions for its execution, and the consequences flowing from such execution.

Hence after all our elaborate systems of classification, we still find ourselves on the threshold, and only on the threshold, of numerous questions of international variance which are yet a long way from receiving an international settlement. The importance of the subject is not disputed and the fact is shown in its selection as one of the questions for discussion at the approaching London Conference of the Association for the Reform and Codification of the Law of Nations. A very practical mark of the importance attaching to it has been given to this question in Belgium, by the immediate publication of that portion of the new Code of

Civil Procedure [Book I., Title I.] which is concerned with Competence, and deals with Foreign Judgments.

In this Book the following rules are laid down\* :—

“ Art. 8. The Courts of First Instance have cognisance of all causes, except those within the jurisdiction of Justices of Peace [juges de paix], Tribunals of Commerce, and Councils of ‘ Prud’hommes.’

“ Art. 9. The Courts of First Instance have cognisance, in addition, on appeal in the matter of judgments given in First Instance by the Justices of Peace.

“ Art. 10. Lastly, they have cognisance of judgments given by foreign judges in Civil and Commercial cases. If a Treaty on the basis of reciprocity be in existence between Belgium and the country in which such judgment has been given, the examination shall bear only on the five following points :—

“ 1. Whether or no the judgment contain anything contrary to public security, or the principles of the Public Law of Belgium ;

“ 2. Whether the judgment has obtained the force of a ‘ *res judicata* ’ according to the law of the country in which it was given ;

“ 3. Whether the copy of judgment produced be duly authenticated according to the law of the said country ;

“ 4. Whether the defendant’s rights have been duly respected ;

“ 5. Whether or no the Foreign Court be the only competent Court by reason of the nationality of the plaintiff.”

On this last point, the editor of the Belgian Code, in the “ *Annuaire de Législation Etrangère*,” from which we cite it, M. Cortot, “ *Avoué* ” at the Tribunal of the Seine, explains in a note, “ Execution must always be demanded at the hands of the Civil Court, whether the judgment proceed from a Tribunal of Commerce or from any other

\* We translate from the text published in the “ *Annuaire* ” of the Society of Comparative Legislation for 1877, p. 470.

Court." He further observes, "If no Treaty exists between Belgium and the country where the [foreign] judgment was given, the Belgian judge is bound (a la mission) to review the entire cause of dispute (le fond du litige)." This statement of the law is worthy of careful remark, for it opens to the Belgian Court of First Instance the position of a Court of Review in the matter of Foreign Judgments, which may, "*ex hypothesi*," be the judgments of a Superior Court in the foreign country. And this fifth point in the new Belgian Code seems the more worthy of remark that it was evidently an addition to the original draft. In the summary of the proceedings in the Belgian Chambers during the Session of 1874-5, contributed to the "Annuaire de Législation Etrangère," for 1876, by M. Oulif, Advocate of the Court of Appeal, Paris, we find that *only the first four points* were then before the Chambers, their text, as printed in 1876, being identical with the text as it passed into law in the subsequent Session, with the exception of the absence of the fifth provision. Under the circumstances, we should have been glad of some account of the reasoning which induced the Chambers to make this addition, and we should think the point might well form the basis of a Paper before the Society of Comparative Legislation, if possible by a Belgian member. In Belgium itself, it is worthy of remark, the new Code of Civil Procedure, so far as hitherto published, has aroused severe criticism from the pen of a distinguished professor, M. Laurent, of the University of Ghent,\* the author of "Principes de Droit Civil." And in the course of his criticism, the learned professor argues two points with especial warmth against the new Code; firstly, that the exclusion of the Magistracy from the Corps Législatif in Belgium has damaged the utility of the ordeal of discussion through which Bills have to pass in the Chambers; and, secondly, that the too incisive logic,

\* Published in the "Journal de Droit International Privé." Paris. 1877. p. 496.

and too scholastic sublety of thought of its principal author, M. Albéric Allard, have left a strong mark on the Code. M. Allard was, indeed, as M. Laurent takes pains to set forth, a Jurist of high intellectual distinction, all too soon lost to science by his early death. But the bent of his mind, which led him to see in the Code Napoléon only a "Memorial of Conquest," was very likely to lead him into extremes in the revision which was entrusted to him, a revision, M. Laurent fears, tending to "deformation rather than reformation." On this particular point, however, of the erection of the Belgian Court of First Instance into a Court of Review of Foreign Judgments, M. Allard is not responsible. He had said in his Report to the Chambers that to proceed to this review would be to "confound executory force with the authority of *res judicata*, *Imperium* with *jurisdictio*." He had also characterized such a proceeding as "impolitic," and "contrary to the principles of International Law." It was the Committee of the Chambers which thought otherwise, and which decided the course of the new Belgian Legislation. Before the Law of 18th Decr., 1851, it would seem that no force whatever was allowed to a Foreign Judgment in Belgium, unless it had been previously declared executory (Fiore, op. cit. p. 20). And at the same time the question was discussed, without being decided, whether Foreign Judgments should be reviewable on their merits. Opinion on this point remained divided, so that it was possible for some writers to maintain that they could be declared executory without review, while yet the Belgian Court of Cassation had, in 1849, laid down the opposite doctrine. In the case of French Judgments, there was no doubt, it is said, that Belgian Law required their review, in terms of the Rescript of King William I., 9th Sept., 1814.

The existing Dutch Legislation seems to allow no force to Foreign Judgments save in certain cases expressly provided for (Code Civ. Proc. Art. 431). But the Government,

as we shall show later on, appears to be favourable to a considerable extension of its present rules, under International Conventions.

In France, Art. 545 of the Code of Civil Procedure, refers back to Arts. 2123 and 2128 of the Code Napoléon, the gist of the whole being that Foreign Judgments can only be made executory by the decision in that sense of a French Court, saving contrary dispositions in Treaties and in the Public Law of France; but as to the extent of the competence of the French Court in such questions, there appears still to be much uncertainty. That it would be held to extend to a review of the Foreign Judgment on its merits seems to be at least doubtful.

Switzerland appears to be guided principally by the existence or non-existence of Treaty-Stipulations, in the view which it takes of Foreign Judgments. Inter-cantonally, Judgments have force throughout the Confederation.

In Sweden and Norway the Foreign Judgment is considered as non-existent. In Russia and Portugal, says Fiore, it is declared executory, after review on its merits. But, with regard to Russia, his statement of the law would seem on this head to require modification, for M. Martens, himself a Professor in the University of St. Petersburg, has pointed out\* that Foelix, who was followed by Fiore, wrote before the latest changes in the Russian Law. These changes are described by Martens as having brought about a revolution in Russian Jurisprudence. It does not appear to us, after careful consideration of the language used by M. Martens, that the Russian Courts do now review a Foreign Judgment on its merits.

The Court which has cognisance of such cases is the Court of the Arrondissement, or District, in which execution is sought (Code of Civ. Proc. of 1860, Art. 1275). This Court, after having examined whether the case was really

\* Journ. de Dr. Int. Privé, 1878, pp. 139, et seqq.

decided in the foreign country by a competent Tribunal, gives its "exequatur" *without previous review of the case "ab imo"* (Ib. Arts. 1276-1279). This certainly seems conclusive as regards the latest Russian Jurisprudence known to us. There are, of course, dispositions with regard to public order and the existing Laws of the Empire, similar to those which we have noticed in Belgium, and which may be considered common to all civilised countries. M. Martens argues from a judgment of the Imperial Court of Cassation, under the direction of the Senate, in 1873, that the existence of Treaty-Stipulations between Russia and the country of the Foreign Judgment is in no wise necessary to the execution of such a judgment by authorisation of the Russian Courts. And his argument on this point seems both clear and cogent.

In Spain, Treaty-Stipulations and Reciprocity seem alike to be demanded. That Greece should not yet have concluded any such Treaties is not surprising, nor yet that under existing circumstances she gives validity to Foreign Judgments whenever asked. To this broad statement, however, Fiore himself mentions (*op. cit.* p. 26) an exception of a somewhat curious character, considering the relative youth of modern Hellenic Jurisprudence. Execution is disallowed in Greece if the Foreign Judgment was given "*in opposition to the proved facts of the case,*" which is not saying much for the Greek estimate of Foreign Courts.

It would seem that the power of review on the part of the Hellenic Tribunals is very widely interpreted, and that in point of fact the case may be gone into "*de novo,*" on demand of the defendant, when execution is sought against him. *He may bring forward fresh proofs,* says Fiore, to persuade the local judges to a different view from that taken by the Foreign Court. This clearly amounts to a fresh trial, and is not at all the same thing as giving execution to a Foreign Judgment. Perhaps this inclination to carrying the doctrine of review to excess, or rather entirely altering

its aspect, may be due in part to the confusion which Greek Jurists themselves confess to reign supreme in modern Hellas. Such Codification as has been hitherto put into force is due chiefly to one of the Bavarian members of King Otho's Council of Regency, the Senator G. L. von Maurer. It consists of a Code of Civil Procedure, a Penal Code, and a Code of Criminal Instruction, all borrowed from the French Codes, except the Penal Code, which was based on a then existing Draft Code for Bavaria. A Civil Code had been projected by Maurer, who had caused the Greek Customary Law to be collected with a view to ultimate Codification. But the matter may be said to have slept from that day until 1856, when the first part of the proposed Code was published. This contained the Titles concerning the enjoyment and privation of Civil Rights, Civil Registration, and Domicil. In 1861 fresh Titles were published concerning Minority, Tutela, and Emancipation. Meanwhile the whole of the Civil Law of the Byzantine Empire remains in force. Thus it is easy to see, as Professor Calligas, of the University of Athens, remarks in the interesting paper\* upon which we rely for these facts, what is the state of existing Legislation in Greece. We should not hesitate to say that such a state must be one little removed from chaos, and we can well understand that, under the circumstances, a Hellenic Tribunal might consider it much easier to go into a foreign case "de novo" than to attempt to settle whether or no it had been decided in conformity with Greek Law. We find nothing bearing directly on the subject of Foreign Judgments in the sketch of the Draft Code given by Prof. Calligas, but it may not be out of place to remark that the Code Napoléon and the Italian Code form the principal sources of the new Hellenic Legislation.

The practice of the United States in the matter of

\* Bulletin, Society of Comparative Legislation (Paris), July, 1876



Foreign Judgments, as explained in the latest account we have seen,\* by Messrs. Coudert Brothers, advocates in New York, appears to be not without points of similarity to the Greek practice. And yet there is not the same reason for a fresh action there as we have suggested for Hellas. But as a Foreign Judgment can only receive effect in the United States by means of the authority of a local Court, it becomes necessary, say Messrs. Coudert, to originate a new process, based, however, on the judgment, not on the subject of the litigation. Yet the object of this new suit is only to establish the regularity of the Foreign Judgment, which is not itself reviewed by the American Court. It appears to us somewhat difficult to maintain, as nevertheless we do find maintained, that Courts which require a fresh suit to be brought on the question of the regularity of a Foreign Judgment are upholding the definitive effect of such Judgment. Perhaps, however, what is really meant is only that the United States Courts take the ordinary precaution, which we have seen required by other Judicatures, to have the regularity of the Foreign Judgment established before proceeding to give it effect. If so, the true state of the case might be put much more plainly and briefly. If that is all that the United States Courts do, it is neither more nor less than what the Congress of South American Jurists,† held at Lima last year, resolved upon recommending. They decided that Foreign Judgments should be carried out, on request made to the local Court, after examination into the regularity of the procedure and the executory character of the Judgment, provided it be not contrary to the local Constitution.

As the Lima Congress only comprised those States of the South American Continent which are historically Spanish, the Brazilian Empire was not represented there. We only

\* Journ. de Dr. Int. Privé, 1879, pp. 21 et seqq.

† Bulletin, Soc. of Comp. Leg., June, 1879.

know that the latest Brazilian Legislation on the subject of Foreign Judgments took place in 1875, and in general terms that the Government of the Empire is thereby authorised to regulate the execution of Foreign Judgments, on condition of reciprocity.\*

It is not always clear on the surface of such information as we can obtain whether the request for execution may be made by the interested party, or must come through rogatory letters of the foreign Court. The Lima Congress, by exacting a "rogatory commission," seems to have adopted the latter course, which would appear likewise to be the practice of some European States, *e.g.*, Austria. But in stating this as the Austrian practice, Fiore guards himself by saying that it is the case, at least as regards Italy, being governed by a ministerial Order of 1853, and then, of course, limited to the Kingdom of Sardinia, but renewed in 1872 with regard to the Kingdom of Italy. He then discusses the difficulties which are apt to arise under such a rule, showing that Italian Courts, not being bound to such a course by their own Code, frequently refuse to grant the desired letters. It is obvious that such a state of things, wherever found, must cause great inconvenience to the subjects of the two States, who in most cases would be, as a matter of fact, suffering for the unfortunate jealousies or suspicions which often have no better origin than the fears caused by a perhaps importunate minority. Of the doctrine and practice of the Italian Courts in the matter of Foreign Judgments a very full and instructive account has been given in the pages of our able Belgian contemporary, the "*Revue de Droit International*"† (now edited by Professor Rivier, of Brussels), by Sig. Cesare Norsa, a distinguished Italian Advocate, and Associate of the Institute of

\* *Annuaire de Législation Etrangère.* 1878. Page 842.

† 1877. Nos. I. and II., forming those portions of a longer series of articles, which deal with this branch of Private International Law.

International Law. Sig. Norsa contends that the Legislature of his country has treated this question in a liberal spirit, and that it is favourable to the execution of Foreign Judgments, whatever the nationality of the parties interested. First of all, says Sig. Norsa, it lays down the due observance of International Conventions on this subject; failing these, it determines the conditions which it will exact before giving force to the Foreign Judgment, and which bear upon its form rather than its substance. In principle, the substance of a Foreign Judgment is upheld in Italy, unless, of course, it be contrary to the Public Law of the Kingdom, or to public order. All that the Italian Court enquires into is comprised under the head of "those external conditions which constitute the essential guarantees of good Procedure," viz., the competence of the Foreign Court, the regularity of its procedure in the case, and the observance of all due forms securing the defendant's rights. These details are ascertained by the process called "giudizio di delibazione," or suit for exequatur (instance en exequatur.) This Procedure, says Sig. Norsa, is sufficiently simple, but he admits that it is still capable of improvement. By means of the suit for exequatur, force is given to Foreign Judgments; when they have passed the necessary ordeal of examination as to form, they may be declared executory in the Kingdom of Italy. Such an examination, for the necessity of which Sig. Norsa contends, is totally different from a review of the Foreign Judgment on its merits, and it may well be upheld as a point which neither can nor ought to be yielded. It is implied in the conditions tabulated by Mr. Piggott\* as being those under which Sir Robert Phillimore allows "*res judicata*" to be a "complete bar to a second litigation." It is expressed in the conditions adopted by the "Institut de Droit International" in their Paris session last autumn, on the report of a special Com-

\* Op. Cit. p. 30.

mittee, formed during the session to consider the question of Foreign Judgments. Having first stated their opinion that a system of Diplomatic Conventions can alone settle the conflicts arising under this head, the committee proceeded to make the following practical suggestions, which we cite from the authorised report in the official organ of the Institute.\* “Among the conditions under which exequatur shall be accorded to Foreign Judgments by the Courts of the State in which execution is to take place, it must be stipulated that, without revision on its merits, the plaintiff shall prove that the Foreign Judgment carries execution in the State where it was given, which implies proof that it has obtained the force of *res judicata*, in all those cases in which the legislation of the State where it was given does not consider judgments against which no appeal lies as carrying execution.” It need scarcely be added that the usual reservations concerning public order are made by the Institute, but we may draw attention to one feature as being, we believe, special to its programme, viz., the clause added in M. Moynier’s suggestion, bringing in Arbitration. “The conflicts to which the application of the rules of procedure determined by International Treaties may give rise, shall be submitted to the decision, without appeal, of a Court of Arbitration of which the constitution and functions shall be laid down in the Treaties.” Such Courts, if they were ever to be constituted, would of course be, *pro tanto*, International Courts. They might perhaps prove a first step in the direction of a general system of International Arbitration (not necessarily a permanent International Tribunal), such as has been so warmly advocated from various points of view by Mr. Dudley Field, the late Dr. Miles, Mr. Henry Richard, M.P., and the distinguished Italian Publicists, Mancini and Sclopis. Into this fresh question, however, we

\* “Revue de Droit International.” Gand. 1878. No. III., p. 377.

cannot here enter. It must suffice for the present to have indicated it as one of the latest solutions suggested for a very difficult problem. We have perforce left untouched many of the questions discussed by Mr. Piggott, even when they fell more within our scope, while others were distinctly outside our present platform. We have purposely made our Foreign Law statements subject to reservation. The difficulty of obtaining accurate information is very great, and will be best appreciated by those who have gone most deeply into this subject, in which we have but attempted to pave the way for future discussion.

Such discussion will be best initiated, we hold, by private individuals. But we cannot conclude this article without reminding our readers that as far back as 1874 the Government of the Kingdom of the Netherlands, through the then Foreign Minister, M. Gericke De Herwynen, expressed, in a Circular Note to the other European Powers, its regret that the executory force of judgments in Civil and Commercial causes should be generally speaking solely Territorial, and that even where an Ex-territorial force was given, it should be hampered by a Procedure so complicated as almost to neutralise its ability (*Revue de Droit International*. Gand. 1877. I., p. 78). This is stronger language than we have ourselves used. We record it to show our readers that when the discussion rises from individuals to Governments, it will not be an entirely new question to some at least among the Cabinets of the Old World.

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#### IV.—MIXED MARRIAGES IN VIRGINIA: KINNEY'S CASE.

LEGISLATION in the various States of the American Union has been seriously affected by the existence of a strong feeling of race-antagonism. Thus it has been decided, in United States Courts (*In the matter of Ah Yup*, Alb. L.J. 1878, vol. 17, No. 20), that a Chinese man is not a "white," in the legal sense importing the capacity of naturalisation. And there has been a recent judgment of the U. S. Circuit Court in the Eastern District of Virginia, which has decided that the Federal Courts must uphold the State Law of Virginia, which prohibits intermarriage between the white and black races, whether between a white man and a negro woman, or the converse, and makes any such marriages not simply voidable, but void. The judgment in the case which has recently occupied the Circuit Court in East Virginia is a very elaborate one, and we think the care with which it was drawn up, quite as much as the complicated nature of the questions involved, renders it specially deserving of reproduction in these pages. For it will be observed that the Court had to decide upon the very delicate constitutional question of State rights and Federal rights, as well as to consider the nature of the contract of marriage. This last question has occupied so much of our own attention in this Review that we conceive a part, at least, of the judgment in Kinney's case may be looked upon as carrying on the discussion from an American point of view. In laying Judge Hughes's decision before our readers, we, of course, make the same reservation as the learned Judge himself made in its delivery. That is to say, we express no opinion on the policy or the justice (from the point of view of Natural Law) of the Law of the State of Virginia, prohibiting intermarriage between

certain races. Nor do we profess to agree with all the various links in the chain of reasoning by which the Court arrived at its decision. Some of these, indeed, strike us as extremely subtle, and open to question, perhaps even to a different conclusion. We are not convinced, for instance, that the marriage in the district of Columbia may not have been validly contracted by Edmund Kinney and Mary Hall, *quà* citizens of the United States, though it were invalid *quà* their State citizenship. But the ability and scrupulous carefulness of the learned Judge are evident throughout.

The imposition of a penalty in addition to declaring the prohibited marriage void, marks a salient difference between the Virginian and English Marriage Laws. And the severity of such a punishment as five years of imprisonment with hard labour inflicted in this case, in accordance with the State Laws, will probably startle Englishmen generally, as well as those subjects of the United Kingdom who, at various times, have committed the analogous fraud on their country's laws of going to a foreign State to contract marriage with a deceased wife's sister.

The case on which the present judgment was given arose on petition of Edmund Kinney, a negro, for five years resident in Hanover County, Va., who, in October, 1878, visited Washington, D.C., and was there legally married to Mary S. Hall, a white woman, with whom he soon after returned to Hanover County, where they lived together as man and wife. They were both arrested, tried, and convicted by a State Court, for feloniously leaving the State of Virginia for the purpose of marrying, and for having so intermarried, and then returned to the State of their domicil and there cohabited. Upon conviction, each party was sentenced to five years of hard labour in the State Penitentiary, where Kinney was confined at the time of presenting his petition, praying for a writ of "*habeas corpus*," addressed to the superintendent of the penitentiary, on the alleged ground that the petitioner was confined in

violation of the Constitution and Laws of the United States.

The Attorney-General of Virginia appeared for the Commonwealth of Virginia. Judgment, refusing the writ, was given by Judge Hughes in the following terms\* :—

“ The question presented by this petition involves so seriously the relations of the Federal courts to the laws of the States and their administration by State tribunals, that I shall be excused for giving a carefully-considered and painstaking explanation of the ground of my action in this matter. Leaving out of the text such words and clauses as have no application to the case, the following are the provisions of law relating to the jurisdiction of this court on the question of awarding a writ of *habeas corpus* on this petition :

“ Section 753 of the Revised Statutes of the United States provides that the writ of *habeas corpus* shall, in no case, extend to a prisoner in jail, unless (among other instances of which this is not one) ‘ where he is in custody in violation of the Constitution or a law of the United States.’ Section 754 requires that the application for the writ shall be in writing, setting out the facts concerning the petitioner’s detention, verified by affidavit ; and section 755 authorizes the writ to issue, ‘ unless it appears from the petition itself that the applicant is not entitled thereto.’

“ The writ, therefore, is not issued as a matter of course. Whether it shall go out or not depends upon the facts presented by the petition, showing whether or not the petitioner’s detention in jail is in violation of the Constitution or a law of the United States. If it appears from the petition itself that the Constitution or a law of the United States has not been violated in the petitioner’s arrest and imprisonment, then, of course, the writ must not

\* U.S. Circuit Court, Eastern District of Va., Richmond, Va., 14 May, 1879. *Ex parte Edmund Kinney*. Reported in the *Virginia Law Journal*, Vol. III., No. 6, June, 1879.



go out. It is essential, therefore, to inquire whether, in the facts stated by the petition, the Constitution or any law of the United States has been violated ; and first, I will consider whether there has been a violation of the Constitution.

“ It must not be forgotten that the Federal courts are forbidden to issue the writ of *habeas corpus* in favour of a prisoner in jail under conviction of a State court, unless the petition itself makes a case for jurisdiction under section 753. I am to inquire whether the averments in this petition release me from that inhibition. I can imagine no subject on which the Federal courts ought to be more considerate in assuming jurisdiction.

“ The petitioner here is a negro man ; but the question of issuing the writ does not turn upon any provisions of the Constitution relating particularly to race or colour. It is only the Fifteenth Amendment which makes special mention of that subject, in providing that the right of a citizen of the United States to vote shall not be denied or abridged on account of race or colour. No other provision relates particularly to the distinction of race or colour. And as no question of voting is raised in this case, we have no concern with the Fifteenth Amendment. The question here is one of marrying, and there is nothing in the National Constitution expressly forbidding a State from abridging the right of marrying, or indeed any right but that of voting, on account of race or colour. The Fifteenth Amendment embodies the implication that a State may abridge any privileges of its citizens other than that of voting. No provision of the Constitution relating particularly to the coloured man as such has been violated by the State of Virginia in the prosecution, conviction and imprisonment of this petitioner.

“ If any constitutional provision has been violated at all, it is only some general provision relating to the rights and privileges of citizens at large. Is it contended that the

first section of the Fourteenth Amendment has been violated? That section declares that 'all persons born in the United States are citizens of the United States and of the State wherein they reside,' and provides that 'no State shall make or enforce any law which shall abridge the privileges of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.' This section, after declaring that all persons born in the United States shall be citizens (1) of the United States and (2) of the State wherein they reside, goes on in the same sentence to provide that no State shall abridge the privileges of citizens of the United States; but does not go on to forbid a State from abridging the privileges of its own citizens. Leaving the matter of abridging the privileges of its own citizens to the discretion of each State, the section proceeds, in regard to the latter, only to provide that no State 'shall deny to any person within its jurisdiction the equal protection of the laws.'

"Thus it is seen that the Fourteenth Amendment itself classifies the privileges of citizens into those which they have as 'citizens of the United States,' and those which they have as 'citizens of the State wherein they reside;' and this classification has been abundantly recognized, illustrated and enforced by the Supreme Court of the United States in numerous decisions.\*

"The rights which a person has as a citizen of a State are those which pertain to him as a member of society, and which would belong to him if his State were not a member of the American Union. Over these the States have the

\* "See *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, 629; *Gibbons v. Oden*, 9 Wheaton, 203; *New York City v. Miln*, 11 Peters, 133; *Scott v. Sandford*, 19 Howard, 404-'6 and 580; *License Tax Cases*, 5 Wall., 471; *Paul v. Virginia*, 8 Wall., 180; *United States v. Witt*, 9 Wall., 41; *The Slaughter House Cases*, 16 Wall., 36; *United States v. Reese et al.*, 2 Otto, 214, and *United States v. Cruikshank et al.*, 2 Otto, 542. See also *Corfield v. Coryell*, 4 Wash., c. c., 371; *United States v. Petersburg Judges of Election*, 1 Hughes, 505, and *The Federalist*, No. 45."

usual powers belonging to government ; and these powers ' extend to all objects which, in the ordinary course of affairs, concern the lives, liberties (privileges), and properties of the people ; and of the internal order, improvement and prosperity of the State.'—*Federalist*, No. 45. ' The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed.' (Chief Justice Marshall, speaking specially of marriage, in the *Dartmouth College Case*, 4 Wheaton, 629.) Their powers extend, of course, to the control of the domestic relations of all classes of citizens of a State.

" On the other hand, the rights which a person has as a citizen of the United States are such as he has by virtue of his State being a member of the American Union under the provisions of our National Constitution. For instance, a man is a citizen of a State by virtue of his being native and resident there ; but if he emigrates into another State, he becomes at once a citizen there by operation of the provision of the Constitution of the United States making him a citizen there ; and he needs no special naturalization, which, but for the Constitution, he would need, to become such a citizen. Again, if a citizen of Virginia is allowed by her laws to carry on a business by paying a certain tax, a citizen of Maryland who comes into Virginia and pays the tax is entitled under the National Constitution to carry on the same business in Virginia. The Virginian carries on the business here by right of his State citizenship : the Marylander carries it on here by right of his national citizenship. In the Slaughter House Cases, the Supreme Court of the United States had under review an act of the Legislature of Louisiana incorporating a company and conferring upon it the exclusive privilege of slaughtering animals within a defined area adjoining the city of New Orleans. Certain butchers of the vicinity, who were thus

deprived of the privilege of exercising their trade in that area, assailed the charter as contrary to the provision of the Fourteenth Amendment of the National Constitution quoted above. But the Supreme Court held that the privilege of butchering animals was of the class belonging to persons as citizens of their State, and not belonging to them as citizens of the United States. It therefore held that the legislative act abridging this right of the New Orleans butchers, and confining it exclusively to a favoured corporation, did not violate the Fourteenth Amendment or any law passed under it, and could not be the subject of relief by a Federal court, however unjust the State law.

“ In the light of this commentary, can it be intelligently contended that the laws of Virginia relating to marriage are obnoxious to the Fourteenth Amendment ?

“ These laws are as follows :

“ The ninth section of chapter 104 of the Code of Virginia provides that ‘ no man shall marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half sister, aunt, son’s widow, wife’s daughter or her grandmother or stepmother, brother’s daughter or sister’s daughter.’ The tenth section of the same chapter provides that no woman shall marry within degrees correlative with those defined in the ninth section. Among still other inhibitions of marriage, the same Code, in the first section of chapter 105, provides that ‘ all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce or other legal process.’

“ The penal provisions are as follows: ‘ If any person marry in violation of the ninth or tenth section of chapter 104 of the Code, he shall be confined in jail not more than six months, or fined not exceeding 500 dols., at the discretion of the jury. Any white person who shall intermarry with a negro, or any negro who shall intermarry with a white

person, shall be confined in the penitentiary not less than two nor more than five years.'—Criminal Revisal of 1878, chapter 8, sections 3 and 8.

“ It is clear that I am bound by the authorities which have been cited to treat the privilege of marriage as belonging to the class which a person has as a member of society, and not to the class which he has by virtue of the State in which he resides being a member of the American Union. If Virginia were in the mid-ocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the National Constitution. The right to enact as law any one of the three prohibitions of marriage which have been quoted from the Code, as between her own citizens residing within her own territory, is as clear as the right to make the other two. With the propriety, policy, or justice of such laws, a court of the United States has nothing to do. As individual citizens, their judges might possibly question the policy of such a State law, but as judicial officers they can only inquire what is the law. The Fourteenth Amendment gives no power to Congress to interfere with the right of a State to regulate the domestic relations of its own citizens, and if a State enact such laws as those which have been quoted, the Federal courts must respect them as they stand, without inquiring into the reasons of them. However harsh a State law may be, they can only say, with Ulpian, ‘*Hoc quidem perquam durum est, sed ita lex scripta est.*’

“ The clause of the Fourteenth Amendment under review makes a further distinction. After declaring that no State shall make any law which shall abridge the privileges of citizens of the United States, it adds: ‘Nor deny to any person within its jurisdiction the equal protection of the laws.’ Here is a distinction between citizens of the United States and ‘any persons,’ whether citizen or alien, residing

or happening to be within the borders of a State. The declaratory clause forbids any abridgment of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a State's borders. The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal. It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the Constitution and laws of the United States confer upon a citizen as a citizen of the United States, shall be enjoyed without abridgment ; and it provides that all persons within a State, whether a citizen of the United States, or of the States, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or not equal, they may have from the United States or from the State. However unequal their privileges respectively, yet a foreigner, a citizen of another American State, and a citizen of the State, shall have the benefit equally in the State of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty, and property.

“ I think it plain from this review that an equality of privileges is not enforced by the Constitution upon a State in respect to its domestic laws, for the government of its own citizens as such, while they are within its jurisdiction. But even if it did require an equality of privileges, I do not see any discrimination against either race in a provision of law forbidding any white or coloured person from marrying another of the opposite colour of skin. If it forbids a coloured person from marrying a white, it equally forbids white person from marrying a coloured. In its terms, and for all I know, in its spirit, the law is a prohibition put upon both races alike and equally. In the present case, the white party to the marriage is in imprisonment as well as the coloured person.

“I think it clear, therefore, that no provision of the Fourteenth Amendment has been violated by the State of Virginia in its prosecution of this petitioner. It would seem to follow from this conclusion that no Act of Congress passed to enforce that amendment is violated ; and I know of none that can be claimed to have been, unless it be the first section of the Civil Rights Act of 1866, now section 1,977 of the Revised Statutes, which provides that ‘all persons within the jurisdiction of the United States shall have the same right in every State to make and enforce contracts as is enjoyed by white citizens, and shall be subject to like punishments,’ &c. As to punishments, I have just shown that the penalty of the State law is denounced equally and alike upon the white and coloured persons who contract the illegal marriage with each other. As to rights, this is a law for the enforcement of that clause of the Fourteenth Amendment, which requires a State to give the equal protection of the laws to all persons within its borders. All are permitted to make and enforce contracts ; not, indeed, any sort of contracts which they may see fit to make—*e.g.*, polygamous or incestuous contracts of marriage, or usurious contracts for money, but such contracts as are lawful. It is for a State and for Congress, each within its respective sphere of constitutional authority, to say what shall be lawful contracts, and it is only such as are legal that can be made and enforced within the State by ‘all persons within the jurisdiction of the United States.’ Provided the State law does not abridge a right which a person has in his character of a citizen of the United States, of which marriage, as we have seen, is not one, the State may declare at will what contracts are and what are not legal within its jurisdiction, and section 1,977 confers the right of enforcing only such contracts as are legal.

“Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make

laws affecting the domestic relations and regulating the social intercourse of the citizens of a State. If it were to make such a law for the States, that law would be unconstitutional, and the Federal courts would not hesitate to declare it so. It is the State which is endowed with the sovereign power of making such laws, and therefore only those contracts of marriage that are legal under State laws can be enforced or enjoyed within the jurisdiction of the State.

"All this has been said on the hypothesis that the contract of marriage is subject, like pecuniary contracts, to the operation of section 1,977. But marriage is more than a contract. It may be entered into at the will of competent parties, but it cannot, as other contracts may, be released at their will. Nor can its terms be shaped at their will; it cannot be for so many years and then cease, for it must be 'until death us do part;' it cannot be entered into with one or more of the opposite sex at pleasure, but must be with one only, for the joint lives; it cannot be confined in effect to a single territorial jurisdiction, but has the same effect all over the world, so far as permitted by the law of each State or nation. It is plain, therefore, that marriage is not, in many of its qualities, of the class of contracts contemplated by section 1,977 of the Revised Statutes; and in the Dartmouth College Case (4 Wheaton, 629), it was held by the Supreme Court of the United States that the clause of article 1, section 10, of the National Constitution, forbidding a State from passing any law impairing 'the obligation of contracts' does not embrace marriage, it never having been intended to forbid a State Legislature to pass an act of divorce, or an act conferring power upon State Courts to grant decrees of divorce; the Supreme Court being of opinion that the contracts contemplated by the clause were only such as relate to property or pecuniary values (1 Minor's Inst., 275). Thus we see, from another point of



view, that marriage is not one of the 'privileges' in regard to which the National Constitution and Congress can restrict the power of the States.

"It is clear, on the whole, that section 1,977 is not violated by the marriage laws of Virginia, and I know of no other act of Congress that has been, considering the petitioner and his consort as citizens of Virginia, and treating their case as if the marriage had been entered into in this State.

"But this marriage was not entered into here. The parties to it went to the District of Columbia for the purpose of contracting it; did there contract it; and returned to reside and cohabit together in this State. Yet this is not the case of citizens of another State, lawfully married in that domicile, afterwards migrating thence in good faith into this State. If this petitioner had been a born citizen of the District of Columbia, and had there married a white woman in conformity to the laws of that jurisdiction, and had afterwards migrated with his lawful wife to Virginia, and had been, after becoming thus domiciled here, prosecuted under that provision of the law of Virginia which has been quoted, and convicted and imprisoned, and had filed his petition here, praying for an inquiry into the cause of his detention in prison, the cause presented would have been essentially different from that actually under consideration. Then the question would have been whether such citizens of another State could claim here the protection of the second section of the fourth article of the National Constitution. This section declares that 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' At first blush it would seem that this provision would give a citizen of the District of Columbia, lawfully married as a citizen there and afterward domiciliating here, the right to reside here under that marriage. But even in such a case the Supreme Court has decided otherwise.

That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the Constitution just quoted, and by the clause of the Fourteenth Amendment previously considered. But it is equally true that such a citizen could not, by becoming a citizen of Virginia, bring here the privilege of exercising, as such, a right legally enjoyed in the District, but not given here. In the case of *Paul v. Virginia* (8 Wallace, 180) the Supreme Court of the United States held that 'special privileges enjoyed by citizens in their own States are not secured to them in other States' by the provision of the fourth article of the Constitution which has been quoted. Reviewing its decision in *Bank of Augusta v. Earle* (13 Peters, 586), the court said that it was never intended by this provision to give to citizens from another State higher and greater privileges in any State than are enjoyed by citizens of that State; that it 'was not intended by the provision to give to laws of one State any operation in other States; that they can have no such operation except by the permission, express or implied, of those States; and that the special privileges which they confer must be enjoyed at home, unless the assent of other States to their enjoyment therein be given.' (Pp. 180, 181 of 8 Wallace.) The provision of the Constitution in question refers to the privileges given in the State into which the citizen goes, and not to those given in the State from which he comes. And so, even if this petitioner had been a citizen of another State, lawfully married there, and had come here bringing his wife, intending to live here in a condition of matrimony forbidden by our laws, he could not claim the protection of the National Constitution or of any law of Congress in thus violating our laws.

" But the case of the petitioner is weaker than that just

supposed. He and his consort were citizens of Virginia. They went abroad to be married in evasion of her laws, and they returned to cohabit together here in violation of them. The marriage certificate gives Virginia as the petitioner's residence, and his going to the District of Columbia was plainly an act *in fraudem legis domesticæ*. The question whether a marriage illegal at home, and contracted in another place, to which the parties had gone in intentional evasion of the domestic law, should be treated as valid by the home State on their resuming residence within it, has been much discussed by learned jurisconsults, such as Burge, Huber, Savigny, Pothier, Lord Mansfield, Lord Campbell, Lord Cranworth, Story, Kent, Wharton and others, whose opinions have been divided. But the question thus discussed has supposed the non-existence of positive law in the home State. It has been on the question whether the courts of the home State should, in the absence of statutory law, treat the marriage as valid in comity to the State where it was contracted; all writers conceding to the home State the power of adopting positive laws declaring such marriage illegal at will. For I think I do not go too far when I assert it as a principle now well settled that 'a State may follow its citizens abroad and attach to acts done there the same consequences as if done at home; and that though the law of the place of a marriage may determine its forms and regularity, yet the law of the domicile of the parties must decide whether the contract was one which might be lawfully made;', and this unquestionably is the rule in regard to marriages polygamous, incestuous and contrary to public policy. Our own Court of Appeals has so decided in *Kinney v. Commonwealth* (2 *Virginia Law Journal*, 632); following the English House of Lords in the case of *Brook v. Brook* (9 House of Lords cases, 193). So also have the Supreme Courts of North Carolina, South Carolina and Louisiana, in *Williams v. Oates* (5 Iredell, 538); *State v. Kennedy*, (76 North Carolina, 351);

*State v. Ross*, (77 *ibid.*), and *Central Law Journal* for April, 1877, and *Dupré v. Bonead* (10 La. An., 411).

"But the Supreme Court of Massachusetts, in *Medway v. Needham* (16 Mass., 157), and that of Kentucky, in *Stevenson v. Gray* (17 B. Monroe, 192), have decided contrariwise.

"The question can no longer be treated as open, however, in Virginia, whose Legislature has recently, in the criminal revisal of March 14, 1878, chapter 7, section 3, declared that:

"If any person, resident in this State and within the degrees of relationship mentioned in the ninth and tenth sections of chapter 104 of the Code, or any white person and negro, shall go out of the State for the purpose of being married, and with the intention of returning, and be married out of it, and afterward return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished, as if the marriage had been in this State.'

"Now there are many illegal marriages other than those named in the foregoing penal section, of which, though illegal here, Virginia takes no notice if contracted without her jurisdiction. The ordinary 'runaway matches,' so frequent in this country, and those known as Gretna Green marriages in England are not placed in either country under the ban of annulling or penal statutes, but, on the principles of inter-state comity, are allowed to stand good. It is only marriages which are polygamous, incestuous or contrary to public policy which are made the subject of penal exactments, such as that of the third section of chapter 7 of our criminal revision just given.

"This petitioner is here, not as a citizen of the District of Columbia, to which he went to be married in evasion of the laws of Virginia, but as a citizen of Virginia amenable to her laws. He is here in that character only, and has brought back no other right in regard to the marriage which he made abroad than he took away. He cannot bring the

marriage privileges of a citizen of the District of Columbia, any more than he could those of a citizen of Utah, into Virginia, in violation of her laws. It was competent for the State of Virginia, so far as there is anything in the Constitution and laws of the United States to prevent, to enact the law just quoted under which the petitioner was convicted, and therefore his case is beyond relief from a Federal court. I know it is claimed that the provision of the fourth article of the National Constitution, which requires each State to 'give full faith and credit to the public acts, records and judicial proceedings of the other States,' has an important bearing on the present case. I have already abundantly shown that it cannot have the effect of making the laws of one State the laws of another. It is doubtful whether the marriage certificate of a clergyman or magistrate is a 'public' record in the meaning of this provision of the Constitution. But whether it be or not the clause in question could only go to the extent of rendering indisputable the fact of the marriage and of its legality in the place of contract. To give to public records 'full faith and credit, is to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated.'—Story on the Constitution, section 1,310. 'A Court is bound to take judicial notice of the public records of another State.'—*Owings v. Hull*, 9 Peters, 627. 'A judgment in one State is a judgment in another, only so far as to preclude inquiry as to the merits of the subject-matter of the original judgment.'—*McElmoyle v. Cohen*, 13 Peters, 312. So that a money judgment obtained in the Courts of another State is not a judgment here, but only a chose in action, requiring to be specially sued upon in this State. A public record certifying a marriage to have been legally contracted and valid there, though indisputable proof here of those two facts, yet does not convert the fact of validity there into validity here, contrary to the express local law. It has never been

pretended that the laws of a State, can by the acts of individuals be subordinated within its own jurisdiction to the laws established by another State. A citizen of Virginia may go to the Federal District of Columbia, or to the Federal Territory of Utah, and be married there in conformity to the local laws, and may remain there as a resident and citizen with impunity. But if his object in going was to evade the laws of Virginia, and if, after marriage, he returns here and remains in a condition of matrimony forbidden by our laws, the certificate of his marriage in the District or Territory, in conformity to its laws, will have no other value here than as indisputable proof of his violation of our laws.

“ On the whole, I am of opinion that the law of Virginia, under which this petitioner is detained in prison by the State, does not violate the Constitution or any law of the United States; and that I have, consequently, no jurisdiction to grant the relief for which the petitioner prays. The writ of *habeas corpus* is denied.”

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## V.—SELECT CASES: SCOTTISH.

BY HUGH BARCLAY, LL.D.

### **Succession—Accumulation—Thellusson Act.**

A testatrix directed her trustees, after the lapse of certain annuities, to invest a specific sum for certain charities, and for increasing the fund yearly to add one-fourth part of its interest, and to pay the remaining three-fourths to the charities equally: *Held*, on a special case—1st. that the direction to accumulate the one-fourth was null and void after twenty-one years from the time the direction came into operation; and, 2nd. (*dub.* Lord Ormidale) the whole income, after the lapse of the

statutory period fell to be paid over to the charities, and not to the heir of the testator. *Observed* that personal bar could not be pleaded against the Act which was passed from views of public policy. Per Lord Justice Clerk (Lord Moncreiff): "If the fund directed to be accumulated is not the subject of any *present* gift, then the right of the eventual beneficiary will not be accelerated, or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But, if there be a present gift of the fund itself, and the direction to accumulate is only a burden on the gift, then the burden will terminate at the expiration of the term, and the gift will become absolute in the person of the donee." Many English authorities were cited. 24 Nov., 1877. *Hector and others v. Sir William Stirling Maxwell*, 5 Session Cases, 248.

#### **Culpa—Railway—Master and Servant.**

An engine-driver, employed by a railway company to drive a train on another line over which they had running powers, was accompanied by a pilot-man on his first trip. He walked on the line to the signal box without a lamp, and fell over an unfenced bridge, and was killed. *Held*, that the accident happened from his own fault, and that the company was not liable. Per Lord President Inglis: "The fault charged against the company is, that they did not fence, by a parapet or otherwise, a bridge by which the railway crossed a turnpike road. It is impossible to say that all such bridges must be fenced, like bridges which occur on a roadway. A servant, who was unacquainted with the line, cannot be justified in passing over it without a light. The danger was very great. It is bad enough to walk along a line in the day time, but for anyone to attempt to walk along an unfenced railway in the night-time without a light, was most rash and foolhardy. That was the cause of the accident. I fear it was the man's own fault." Numerous English cases were cited. 30 Nov., 1877. *Clark v. Caledonian Railway Co.*, 5 S.C., 273.

#### **Bankruptcy—Illegal Preference.**

A machinist ordered and received from an engineer a machine to take the place of another, which he intended to sell; but not getting it sold, and having no space for the erection of the one sent, after a couple of months it was of consent returned, and received. The price, which never had been paid, was credited in the seller's books. Shortly afterwards the buyer became

bankrupt, and the trustee on his estate claimed the property or price of the machine: *Held*, that the return of the machine was a *bonâ fide* transaction in the ordinary course of trade, and was not reducible. Per Lord President: "Both parties were in *bonâ fide*. The bankrupts did not anticipate bankruptcy, and the defenders had no suspicion that the bankrupts were, or were tending to become, bankrupts. No doubt, the machine being returned while the price was unpaid, the effect was to discharge the debt. But there is nothing remarkable in an article of this kind being returned, where the purchaser after all finds he does not require it. It is on this ground, with the absence of all intention to confer or obtain a preference, that the judgment of the Court should be based." 7 Dec., 1877. *London Brothers v. Reid & Lauder's Trustee*, 5 S.C., 293.

**Reparation—Wrongful Interdict—Malice and Want of Probable Cause.**

Police Commissioners obtained interdict (injunction) against an inhabitant, restraining certain building operations, said to be in contravention of an order of the Commissioners. The order was found to have been illegal, and the interdict set aside. In an action of damages against the Commissioners: *Held*, not necessary to allege malice and want of probable cause. Per Lord Ormidale: "An interdict is not granted as matter of right. It is only granted on cause shown, that is, on a consideration and in respect of the representations of the party applying for it. If, therefore, it turns out that these representations are erroneous, or that for any other reason the interdict is ill-founded, and ought not to have been applied for, it is only reasonable that the party obtaining and using it should answer for the injurious consequences, without it being necessary in an action of damages to aver and in the issue to charge malice and want of probable cause." 19 Dec., 1877. *Kennedy v. Police Commissioners of Fort William*, 5 S.C., 302.

**Ship—Charter Party—Bill of Lading.**

A charter-party fixed a certain rate of freight and "one shilling per ton gratuity for the captain on good delivery of the cargo." A bill of lading merely stated "assigns paying freight as per charter-party": *Held*, 1st., that this reference to the charter-party rendered the consignees liable to pay the captain's gratuity; 2nd., that though part of the cargo had received damage through peril of the sea, the captain was entitled to his



gratuity. Per Lord Justice Clerk (Lord Moncreiff): "There may possibly be claims for the damage done to the goods, if that were done by the carelessness of those in charge. But as a condition of delivery, I am of opinion that the gratuity to the master is as much due by the consignee as payment of the freight." Numerous English cases were cited. 15 Dec., 1877. *Howett v. Paul, Sword & Co.*, 5 S.C., 321.

#### **Legacy—Interest—Legacy Duty.**

A testator, by holograph deed, directed his trustees to pay legacies of £5,000 to C. and B., two of three brothers, and to R., the third son of another family, a legacy of £2,000, and to each of his brothers £1,000. He left the residue of his estate, amounting to £200,000, to be divided equally between A., the eldest brother of the former family, and E., the eldest brother of the latter family. *Held* (Lord Gifford dissenting), (1.) that E. was not entitled to a legacy of £1,000, in addition to half of the residue; (2.) that interest was not due on the legacies from the date of the testator's death, the trustees not having unduly delayed the realization of the estate from which they were to be paid; (3.) that the testator having added on the margin of his instructions "all free from legacy duty," applied to the legacies so marked, but to none else. Per Lord Justice Clerk (Lord Moncreiff): "In ordinary language, the bequest might no doubt include all the testator's brothers, but here it is clearly meant to provide for those members of the family who were not to have an interest in the residue. When it appears that E. is to carry off such an enormous sum as one half of the residue, I conclude that the general term 'brothers' was only used by the testator to save himself the trouble of writing out the names of the six brothers." Per Lord Gifford: "I cannot, by merely guessing at the testator's intention, set aside and deny effect to his words." 20 Dec., 1877. *Sharp's Trustees v. Kirkpatrick*, 5 S.C., 380.

#### **Public Company—Conditional Allotment.**

A joint-stock company was formed, and shares allotted, and a payment made on each share. The allotment letter stated that no further call was to be made unless a favourable report was made on certain mines, and the payments would be returned without deduction. On a petition to settle the list of contributories at the instance of an official liquidator: *Held* (Lord Ormi-

dale dissenting), (1.) that the letter contained a suspensive condition, and did not render the allottees shareholders until it was purified ; (2.) that a provision in the articles as to a qualification for being a director did not apply to the persons originally named as such, but only to those subsequently elected by the shareholders ; (3.) the official liquidator found personally liable in expenses to persons who successfully resisted being placed on the list of contributories. Per Lord Justice Clerk (Lord Moncreiff) : “ There was an unconditional offer to become partners, made by the respondents through the application for shares and the payment of the deposit, but the offer was never unconditionally accepted, and until it was the contract was not complete.” Per Lord Ormisdale : “ The condition in the allotment letters—if there was any proper condition in them at all—was of the nature of a condition subsequent and not a condition precedent, which it required to be in order to prevent the respondents becoming shareholders of the company immediately on the issue of the allotment letters, and payment of the call thereby made.” Numerous English cases were cited. 22 Dec., 1877. *Liquidator of the Copper Co. of Canada v. Peddie, &c.*, 5 S.C., 393.

#### **Sale—Goodwill of Medical Practice.**

A medical practitioner by his settlement directed his practice to be sold for the benefit of his wife. His house had been purchased with her separate funds. The house and practice were separately advertised, and sold at separate prices to the same individual. She undertook to recommend the purchaser to the patients of her husband. A creditor of the husband sued the widow, as executrix, for a debt : *Held* (Lord Gifford dissenting), that it was not so much the goodwill of the deceased's practice which had been sold as the recommendation of the widow and her friends, and so never had been *in bonis* of the deceased, and the widow was therefore not bound to account for the price. Per Lord Justice Clerk (Lord Moncreiff) : “ There is a clear distinction between the goodwill of a trade and the goodwill of a profession, or, as it is sometimes called, a practice which depends entirely on the personal qualities, as well as the personal exertions, of the practitioner.” Per Lord Gifford : “ I think it is quite clear that there may be such a thing as the goodwill of a professional man's practice, and that such may be the subject of a valid and legally effectual contract of sale. It is said that such goodwill cannot pass from the dead to the

living. There is surely nothing illegal in a medical man bequeathing his practice or making a legacy of the goodwill of his practice." Numerous English cases were cited. 10 Jan., 1878. *Bain v. Munro*, 5 S.C., 416.

#### **Carrier—Delivery—Notice of Damage.**

A railway company received 77 heating batteries. They were left at the place of delivery, but no one was present to receive them. Next day the consignees gave notice that *nine* of the articles were broken. A fortnight after notice was given that twelve more had been found broken: *Held*, that the delay in objecting to the twelve raised the presumption that the articles, other than the nine, had been delivered in good order. Per Lord Justice Clerk (Lord Moncreiff): "There was a clear obligation on the consignees at once to look at the state and condition of the articles which had been landed. The consignees accepted the goods as they were delivered, with the exception of the nine, which were objected to, and consequently they must bear the loss." 11 Jan., 1878. *Stewart v. North British Railway Co.*, 5 S.C., 426.

#### **Restrictions on Buildings.**

Ground was feued out as a terrace, with a clause that the houses should be "used as private dwelling-houses only in all time coming:" *Held*, that the feuars had right to prevent another proprietor from using his house as a young ladies' school. Per Lord Ormidale: "The complainers, all of whom have houses in the terrace, have, therefore, a clear and undoubted interest to prevent the respondents from occupying their house as they propose and threaten to do, in respect of the noise and bustle and annoyance otherwise which such occupation would immediately give rise to." Several English decisions were cited. 12 Jan., 1878. *Ewing, &c., v. Hastie*, 5 S.C., 439.

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## Legal Obituary of the Quarter.

(ENGLAND, SCOTLAND, AND IRELAND.)

ASHURST, William Henry, Esq., Solicitor, aged 59. Admitted 1843. *July* 14.

ATTWATER, Charles, Esq., Solicitor, aged 31. Admitted 1871. *May* 2.

BARRETT, James, Esq., Solicitor (Irel.), aged 69. Admitted 1826. *April* 3.

BARTRUM, Joseph Kilvert, Esq., Solicitor, aged 53. Admitted 1850.

BENNETT, Norman, Esq., Solicitor, of Chapel-en-le-Frith, aged 49. Admitted 1865. *April* 20.

BENNETT, William, Esq., Solicitor, Chapel-en-le-Frith, aged 82. Admitted 1819. *April* 20.

BUNN, William, Esq., Solicitor, Ipswich. Admitted, 1834. *June* .

BUTT, Isaac, Esq., Q.C. (Irel.), M.P., aged 66. Called, King's Inns, 1838. B.A., Trin. Coll., Dublin, 1835, M.A., LL.D., 1840. Whately Professor of Political Economy, T.C.D., 1836-41. One of the Counsel for Smith O'Brien. Author of Treatise on Irish Poor Law, a History of Italy, &c., M.P. (Conservative), for Harwich, 1852, for Youghal, 1852-65, for Limerick (Home Rule), 1871-79. *May* 5.

CHUTE, William Lyde WIGGERT-, of the Vyne, Hants, and of the Middle Temple, Esq., Barrister-at-Law, aged 79. Called 1827. M.A., Univ. Coll., Oxon. J.P. and D.L. for Norfolk, and J.P. for Hants. M.P. for West Norfolk (Conservative), 1837-47. *July* 6.

CLARKE, Francis William, of Lincoln's Inn, Esq., Barrister-at-Law, aged 54. Called 1849. *July* 10.

COTTMAN, Arthur, Esq., Solicitor, aged 39. Admitted 1864. *June* 3.

DOBBIN, Charles Edward, Esq., Solicitor (Irel.), aged 33. B.A., Trin. Coll., Dublin. Admitted 1872. *June* 14.

DOYLE, Sir William Henry, Kt., Chief Justice of Gibraltar, aged 56. Called, Middle Temple, 1846. Formerly Chief Justice

of the Bahamas, and of the Leeward Isles, and Judge of the Vice-Admiralty Court. *April 27.*

EDWARDS, John, Esq., Solicitor, aged 67. *July 13.*

FAY, T. MacCabe, Esq., Barrister-at-Law (Irel.), B.A., T.C.D. Called 1864. *April 23.*

FLEMING, John F. Leigh, of the Inner Temple, Esq., Barrister-at-Law, aged 34. Called, 1873. *April 22.*

GAMBIER, Sir Edward John, Kt., formerly Chief Justice of Madras, aged 84. Called, Lincoln's Inn, 1822. Educated at Trin. Coll., Camb., B.A., 1817, and Junior Chancellor's Medallist, M.A., 1820. Recorder of Prince of Wales Id., 1834-6. Puisne Judge, Madras, 1836, Chief Justice, 1842-9. *May 31.*

GREATOREX, William Anthony, Esq., Solicitor, aged 75. Admitted 1828. *April 18.*

HADFIELD, George, Esq., Solicitor, Sheffield, aged 92. M.P. (Liberal), for Sheffield, 1852-74.

HUDSON, George Frederick, Esq., Solicitor, aged 79. Admitted 1827. *May 12.*

HUGHES, Edwin, Esq., Solicitor, Liverpool, aged 42. Admitted 1858. *May 12.*

JOHNSTON, James, Esq., formerly Solicitor, aged 76. Admitted 1827. D.L. for Middlesex. *May 8.*

KEIR, William Augustus, Esq., Advocate at the Scottish Bar, aged 37. Called 1868. Only son of Patrick S. Keir, Esq., of Kindrogan, by Amelia, daughter of late Sir Neil Menzies of that ilk. B.A., Trin. Coll., Camb. (1865). *Feb. 15.*

KENNEDY, James Barron, Esq., Solicitor (Irel.), aged 66. Admitted 1839. *May 30.*

LLOYD, Edward John, of Lincoln's Inn, Esq., Q.C. and a Bencher. M.A., Trin. Coll., Camb. (23rd Wrangler, 1822). Judge of the Bristol County Court, 1863-74. *June 1.*

MACCROSSAN, Edward, Esq., Solicitor (Irel.) Admitted 1874. *May 24.*

MAGRATH, John F., Esq., Solicitor (Irel.), aged 66. Admitted 1838. *May 9.*

MARTIN, John, Esq., Solicitor (Irel.), aged 82. *April 22.*

MASKELYNE, Anthony Mervin STORY-, of the Inner Temple, Esq., Barrister-at-Law, aged 87. M.A., Wadham Coll., Oxford (1818). J.P., for Co. Brecknock. *May 15.*

MONTGOMERY, Robert John, Esq., Barrister-at-Law (Irel.) Called 1843. *April 1.*

NORRIS, George, Esq., Solicitor, West Derby, Liverpool, aged 40. Admitted 1861. *April 13.*

PARKER, Arnold, Esq., Solicitor, Sheffield, aged 49. Admitted 1852. *March 17.*

PEAKE, Hugh Budgen, of the Middle Temple, Barrister-at-Law, aged 75. Called, 1827. *May 7.*

PHILLIPS, Charles Henry, Esq., Solicitor, Kingston-on-Hull, aged 82. Admitted 1820. Registrar of the County Court, Hull. *May 17.*

PULLEINE, James, of the Middle Temple, Esq., Barrister-at-Law, M.A., Trin. Coll., Camb., aged 75. Called 1832. J.P. and D.L., for North Riding of York, High Sheriff, 1870, and for many years Chairman of Quarter Sessions. *March 23.*

RICHES, Alfred Smith, Esq., Solicitor, Cambridge, aged 69. Admitted 1833. *June 2.*

SADD, William, Esq., Solicitor, Norwich, aged 47. Admitted 1858. *April 28.*

SANDS, William, John, Esq., W.S. (Scot). Admitted 1845. *April 11.*

SHEPHERD, Julius Gaboriau, Esq., Solicitor, Luton, aged 79. Admitted 1820. *June 16.*

SMITH, Thomas, Esq., Solicitor, Gloucester, aged 69. Admitted 1842. *June 6.*

STREET, John Widgway, Esq., Solicitor, formerly of Taunton, aged 59. *April 18.*

STREETEN, Francis Towers, of Gray's Inn, Esq., Barrister-at-Law, and a Bencher, Recorder of Worcester, aged 65. Called 1836. For many years reporter, joint editor, and ultimately chief acting editor of the Law Journal Reports. *May 21.*

SWAMY, Sir Mutu Coomara, Kt., of Lincoln's Inn, Barrister-at-Law, aged 44. Called 1863. Educated at Queen's College, Colombo. Admitted an Advocate, Supreme Court of Ceylon, 1856. Member of the Legislative Council, 1861. Knighted 1874. *May 4.*

SWEET, George, of the Inner Temple, Esq., Barrister-at-Law, aged 64. M.A., St. Mary Hall, Oxford. Called 1839. Editor of Bythewood's "Precedents in Conveyancing," &c. *June 26.*

THOMPSON, George Rowland, Esq., Solicitor, Appleby, aged 46. Admitted 1858. *June 17.*

TOLLER, Thomas, Esq., Solicitor, aged 80. Admitted 1824. *March 20.*

TRIBE, William, Esq., Solicitor, Worthing, aged 85. Admitted 1814. *April 26.*

VAUGHAN, Samuel Bradford, Esq., Solicitor, Melbourne, aged 64. *May 16.*

WARREN, Henry Hatchell, B.N.C., Oxford, of the Inner Temple, Esq., Barrister-at-Law, aged 27. Called 1877. *June* 29.

WEBB, George DILLON-, Esq., Solicitor, aged 54. Admitted 1857. *June* 2.

WILBERFORCE, William, of Markington Hall and Ingathorpe, Yorkshire, and of the Middle Temple, Esq., Barrister-at-Law, aged 80. Called 1825. Educated at Trin. Coll., Camb. J.P., for Yorks and Middlesex. Eldest son of the late eminent philanthropist, William Wilberforce, M.P., of Markington Hall, and brother of the late Samuel, successively Bishop of Oxford and Winchester. *May* 26.

WILLIAMSON, Charles Caleb, of the Inner Temple, Esq., Student-at-Law, aged 24. B.A., St. John's Coll., Camb. *May* 7.

WILLS, William Ridout, Esq., Solicitor, of Birmingham, aged 55. Admitted 1846. B.A., Univ. Lond., 1843. *April* 18.

WOOD, George, of Caley Hall, Yorkshire, and of the Inner Temple, Esq., Barrister-at-Law, aged 53. Educated at Univ. Coll., Oxon. Called 1852. *May* 13.

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## Reviews of New Books.

*The Laws relating to Quarantine* of Her Majesty's Dominions Abroad and at Home, and of the Principal Foreign States. By SIR SHERSTON BAKER, Bart., Barrister-at-Law. C. Kegan Paul and Co. 1879.

Fortunately for the well-being of Western Europe, the dangers apprehended from the plague which broke out at Astrakhan in the early part of the year, have, to all appearance, subsided. None the less, however, is Sir Sherston Baker's new contribution to legal literature one of great practical utility. Indeed, after a careful study of the method which he has adopted to reduce into something like order the necessarily rather chaotic mass of rules and regulations which he has brought together, we should say that every master of a sea-going vessel ought to add this volume to his shelves; and it ought also to be widely acceptable to British Consuls and Consular Agents, as well as to legal practitioners in the seats of our great mercantile communities. Sir Sherston has, we think, by his present publication shown good cause why efforts should be made to bring about International Conventions on the very serious questions connected with Quarantine. This portion of the subject, which was beyond the immediate scope of the present work, will no doubt be carefully considered at the London Conference of the Association for the Reform and Codification of the Law of Nations, as it is, we observe, one of those on the order of the day. Nothing could, in truth, be more damaging to the public health than such scenes as are described on the authority of eye-witnesses and sufferers as having occurred in the lazaretto at Lisbon in 1854 (chap. I., note on p. 4). And the very eccentric action of the Vigo Board of Health, even in direct defiance of orders from the Spanish Government (chap. IX., p. 480), shows the necessity of some controlling international authority which would be likely to put a stop to such vagaries. We are glad to find in Sir Sherston's pages a résumé of the proceedings of the International Sanitary Conference, held at Vienna in 1874; but why did he not give us also the results of the Paris Conference of last year? It was held at the Trocadéro, under the auspices of the Official



Committee for Congresses and Conferences during the International Exhibition, and some account of its proceedings, however brief, would have added to the value of Sir Sherston Baker's work. For convenience of size and clearness of type, the book leaves nothing to be desired.

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*The Practice and Procedure of the House of Lords in English, Scotch, and Irish Appeal Cases*, under the Appellate Jurisdiction Act, 1875. By CHARLES MARSH DENISON and CHARLES HENDERSON SCOTT, of the Middle Temple, Esqs., Barristers-at-Law. Butterworths. 1879.

The ancient Appellate Jurisdiction of the House of Lords, the subject of so much controversy in recent years, and which was at one time actually abolished prospectively, as to England, by the Judicature Act, 1873, may now be regarded, we trust, as finally re-established by the Appellate Jurisdiction Act, 1876. In this country reform has ever been preferred to abolition: yet to the imminence of abolition we mainly owe those two salutary provisions—the introduction of legal peerages for life, and the power of the House to continue sitting for judicial purposes, notwithstanding the prorogation of Parliament—which alone rendered the retention of the Lords' jurisdiction possible. Messieurs Denison and Scott have undertaken the useful and necessary labour of providing for Counsel, Solicitors, and Parliamentary Agents, a guide to the practice in Appeals to the House of Lords, as remodelled since the passing of the Appellate Jurisdiction Act, 1876. The work opens with an Introduction, containing an interesting, and for the authors' purpose, sufficiently full sketch of the origin and growth of the Lords' appellate jurisdiction, from its remote germ in the judicial attributes of the Witenagemot of our Anglo-Saxon ancestors. This is followed by a comprehensive and clearly-written exposition of the present Practice, divided into chapters, themselves sub-divided by separate headings. In an Appendix are grouped together a mass of useful information, comprising the Appellate Jurisdiction Act, 1876; the Scotch Statutes, affecting appeals to the Lords; a collection of twenty-three Forms; Precedents of Bills of Costs, revised in conformity with the Act of 1876; Directions for Agents; the Standing Orders applicable since the 1st November, 1876, and a Scale of the Parliament Office and House fees payable respectively by the Appellant and Respondent.

In an elaborate and ingenious note (p. 175) to Section 3 of the Appellate Jurisdiction Act, the authors (referring to the recent cases of *Sottomayor v. De Barros* and *Niboyet v. Niboyet*) point out that it may possibly be held that an appeal lies directly from the Divorce Division of the High Court to the House of Lords, or that an appeal from the Divorce branch of the Probate, Divorce and Admiralty Division of the High Court lies first to the Court of Appeal, and thence to the House of Lords. "In the event," they proceed, "of it being held either that there is a double right of appeal, both to the House of Lords, under the 3rd Section of the Matrimonial Causes Act, 1868, and to the Court of Appeal, under the 19th Section of the Judicature Act, 1873; or that, under the latter section, there is a right of appeal exclusively to the latter Court, points of considerable difficulty may arise. Thus, on the first hypothesis, it may be that on an appeal being brought directly to the House of Lords from a decision of the Divorce Division declaring a marriage void, their Lordships being equally divided in opinion, the rule *semper præsumitur pro negante* would prevail, and the decision annulling the marriage would stand affirmed, while, on the subsequent appeal to the Court of Appeal, that decision might be reversed, and the marriage declared to be valid, and, on appeal to the House of Lords, their Lordships being again equally divided in opinion, the same rule would apply, and the decision of the Court of Appeal, declaring the marriage valid, would be affirmed. . . . and the absurd result might follow, that a man, having legally contracted a fresh marriage after the first judgment of the House, declaring his previous one void, had been pronounced, might find such previous marriage held valid by the second judgment. On the latter hypothesis, also, questions of grave difficulty might arise. Thus, by the 57th Section of the 20 & 21 Vict., c. 85, it is enacted that 'when the time hereby limited (one calendar month, 31 & 32 Vict., c. 79, s. 3) for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against any such decree, or where any such appeal shall have been dismissed, or where in the result of any such appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death.' But if an appeal lies from the Divorce Division to the Court of Appeal, under the 3rd Section of the Appellate Jurisdiction Act, 1876, an appeal will also lie thence to the House of Lords, and the

period within which such an appeal may be brought is fixed, by Standing Order No. 1, at one year. Thus the period, during which the disability to marry again continues, would be extended from one month to one year, plus the time allowed for appealing from the Divorce Division to the Court of Appeal, which is not fixed by any rules applicable to Divorce causes. In these circumstances it may be doubtful whether a fresh marriage, contracted by a divorced person within the time now allowed for appealing, is valid, and, consequently, whether the issue of such marriage are legitimate."

On the whole, we can congratulate the authors on having succeeded in providing the Practitioner with a conveniently arranged and compact *vade mecum*, replete with all necessary information, and rendered easy of consultation by a well-executed analytical Table of Contents and Index.

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*The Law of the Farm*: with a Digest of Cases, and including the Agricultural Customs of England and Wales. By HENRY HALL DIXON, Barrister-at-Law. Fourth Edition. By HENRY PERKINS, Barrister-at-Law, of the Midland Circuit. Stevens & Sons. 1879.

"Dixon's Law of the Farm" has long enjoyed the reputation of being a convenient and trustworthy repertory of information on all the numerous legal questions incidental to the occupation of a Farmer. In preparing the Fourth Edition, the present Editor has carefully revised the whole work, and while rejecting some unnecessary matter has duly noted up all cases interesting to the Agriculturist. The permissive character of the Agricultural Holdings Act has prevented it from exercising much practical influence: hence the necessity for still setting out the various "customs of the county" prevailing in the different counties of England and Wales. The extent and variety of the other topics treated of may be gathered from the headings of the chapters which are devoted successively to Interests in Land, Easements, Trees and Fences, Dangerous Animals, Water, Servants, Conveyance of Horses and Cattle, Distress, Husbandry Covenants, Trespass and Game, Tithes, Landlord and Tenant, Contracts and Sales, and Horses and Cattle. The country Solicitor will find this work a valuable compendium of practical information on matters concerning which he must frequently be called upon to give off-hand advice, and to both Landlords and Agents it cannot but prove a very useful addition

to their bookshelves. The Index appears to be adequate and carefully compiled : and for the convenience of general readers the references to cases are, as in former editions, omitted in the body of the work and confined to the " Index of Cases."

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*Henrici de Bracton de Legibus et Consuetudinibus Angliæ Libri Quinque.* Vol. II. Edited by SIR TRAVERS TWISS, Q.C., D.C.L. (Published under the direction of the Master of the Rolls.) Longmans. 1879.

In this fresh instalment of Bracton's work, Sir Travers Twiss brings forward much new and interesting information, which he regards as tending to fill in the hitherto scanty outlines of our great mediæval jurist's life. The outlines so filled are of necessity still to some extent conjectural ; but, we think it may be conceded that the author of the " Summa " of English Laws and Customs, the Azo, or Irnerius, of mediæval English Jurisprudence, held office at different times as Archdeacon of Barnstaple, and Chancellor of Exeter, and that " Bracton's Mass," in Exeter Cathedral, was a foundation in memory of the distinguished jurist. It may still be a question how far " Dominus Henricus de Bracton " had proceeded in the matter of an ecclesiastical tonsure. The history of the Middle Ages is full of instances of provision being made by ecclesiastical benefices for persons whose lives were spent in secular work, but whom Popes or Emperors or Kings desired to honour and reward.

The Eildon Hills are to this day a memorial of the " uncanny " fame of at least one person thus honoured, whose name became a very synonym for a wizard—that Michael Scott, who knew the word that cleft the Eildon Hills in three. " Quell' altro Michele Scotto fu, che veramente delle magiche frode seppe il giuoco." And, therefore, the great poet of the Middle Ages places him in the fourth " Bolgia " of Hell, and assigns him a suitable punishment. Yet it is on record [Regesta Honorii] that this very Michael, this renowned wizard, who is claimed as by birth one of the " Magnates Scotiæ," was granted permission, on account of his learning, to hold two benefices in England, and was even pressed by Honorius III. to accept the Archbishopric of Cashel, which he modestly declined, alleging his want of knowledge of the Irish language. And when Gregory IX. succeeded Honorius, one of the very first letters he wrote as Pope, on the 28th April, 1227, was to recommend the learned Master Michael Scott to the care of Stephen Langton,

Archbishop of Canterbury, to the end that one who "burning from childhood with the desire to learn languages," and who "not content with Latin literature, had applied himself with commendable zeal to the study of Hebrew and Arabic," should be rewarded with "a suitable benefice." Henry de Bracton was certainly neither astrologer nor magician, and although not acquainted with Hebrew and Arabic, he was no doubt much more fitted for an Archdeaconry than Michael Scott for an Archbishopric. Dean Church seems to have brought forward a comparatively modern case of lay preferment in the person of Edmund Spenser. At least it is certain that there was one "Edmondus Spenser, Prebendary of Effin [Elphin]," mentioned in 1586. The Dean asks who was this Edmondus, and goes on, as we think, to supply the answer by noting the fact that "Church preferments were under special circumstances allowed to be held by laymen." (English Men of Letters. Spenser. By R. W. Church, D.C.L., pp. 166-7.)

The evidence which Sir Travers accumulates in favour of a steady growth in Scientific Jurisprudence in England between the eleventh and thirteenth centuries forms not the least interesting part of the work which he has undertaken. We quite believe that the facts adduced justify the learned editor's conclusions, and indeed we should have been surprised if the result of his researches had been different. We should have had to explain the disparity between England and Continental countries by the geographical fact of her isolation. But we should have required very much stronger evidence for the absence of such a scientific movement than for its presence. There can be no question that the whole of Western Europe took a fresh start in the eleventh century, and that Jurisprudence profited as much as Theology by the release of the Western nations from the fears under which they had freed their serfs and endeavoured to make their peace with Heaven at the close of the tenth century, "*appropinquante mundi fine*." Moreover, it was next to impossible that Norman Jurists, whether ecclesiastical or secular, should not have brought England into direct relation with the spirit of the schools which were making Bologna, Pavia, Padua, and Paris, famous among the nurseries of European learning, and inciting monarchs and those who judged the earth to be wise in their generation, and found "studia" of their own for their subjects. We wish that space admitted of our extracting some of the many quaint illustrations which Bracton employed to enforce his teaching.

They are often also illustrations of mediæval life which deserve the attention of the student of history no less than of the student of law. To both these classes, at our Universities as well as at our Inns of Court, we heartily commend the instructive volume just published by Sir Travers Twiss.

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*A Treatise on the Law of Executors and Administrators.* By the Rt. Hon. Sir Edward Vaughan Williams (late one of the Judges of H.M. Court of Common Pleas). Eighth Edition. By ROLAND L. VAUGHAN WILLIAMS, Esq., of Lincoln's Inn, Barrister-at-Law, and WALTER V. VAUGHAN WILLIAMS, Esq., of the Inner Temple, Barrister-at-Law. Two Volumes. Stevens & Sons. 1879.

Since the Seventh Edition of this well-known standard work was published six years ago, the learned author, the late Mr. Justice Williams, has passed away in a ripe old age, and amidst the esteem and regret of his friends and of the Profession. In the brief Memoir of his Life, contained in the February number of this Review, 1876, we expressed the opinion that his Treatise on the Law of Executors had placed the late Judge in the very first rank of legal authors. "This is indeed," we said, "a model text-book, admirable in arrangement, lucid in style, and profoundly, but not ponderously, learned. With the exception, perhaps, of the works of Lord St. Leonards, it does not occur to us that any Treatise has, for so long a time, occupied the ground which it covers so entirely to the exclusion of all others as this; and we are, we believe, correct in saying that it enjoys an equal pre-eminence in the United States." To this criticism of the work itself it is unnecessary for us to add anything. The Eighth Edition now before us, which is edited by the author's two sons, appears to have been carefully revised throughout, and duly annotated with reference to the new cases decided since 1873. The law as to executors and administrators has undergone no material change since the appearance of the previous edition, but the alterations in the system of pleading, under the Judicature Acts and Orders, have necessitated the omission of several of the old rules which had ceased to be applicable. In some respects we think the editors have been too conservative in their treatment of the text. They have designedly retained the old nomenclature in use previously to the great changes effected by the Judicature Acts. There may be something to be said on the score of

“convenience” for the retention of the old division of remedies against executors and administrators, into remedies “at Law” and “in Equity;” although we think that even here the reasons in favour of a technically correct phraseology preponderate. But we fail to see the advantage of writing “Probate Court,” instead of the equally laconic “Probate Division;” for the cumbrous addition “of the High Court of Justice” is necessarily implied, and therefore needs no expression. The Table of Contents, List of Cases, and copious Index, leave nothing to be desired in the way of assistance to those who wish to look up any specific point.

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*The Succession to the English Crown.* A Historical Sketch. By ALFRED BAILEY, M.A., Barrister-at-Law, formerly Student of Christ Church, and Stowell Civil Law Fellow of University College, Oxford. Macmillan. 1879.

Mr. Bailey deals with an important and often very thorny question in a spirit of historical impartiality. He brings an evidently considerable amount of research to bear upon it, but unfortunately he has adopted Mr. Green's plan of giving no references, without the slight consolation afforded by Mr. Green's general lists of authorities. We can scarcely, therefore, do more than credit Mr. Bailey with the research which we know must have been required to produce his work from the study which we have ourselves had occasion to give it. We regret that Mr. Bailey should have treated the pre-Norman period of our history so briefly. For there, if anywhere, is to be found the germ of the English Theory of Succession to the Crown. That there was, emphatically, a “Blood Royal” before the Conquest is perfectly clear. It was the blood of the House of Cerdic. That within this blood the nearest male (without much regard to legitimacy) was generally considered “promovendus in regem,” is equally clear. But he must be of full age, and otherwise acceptable, or another of the stock would be chosen. This is Teutonic Royalty; membership of a family descended from a mythical Divine, or semi-Divine, ancestor, being generally necessary to election, but election being free within that stock, and even beyond it in case of need. The elections of the Danish and Norman conquerors are tainted with violence; in either case there was practically no other course possible. The election of Harold Godwinson stands out as the one free election outside the West-Saxon Royal



stock. Of Mr. Bailey's suggested descent of Harold from Alfred the Great we do not think much, and his real relationship to the Danish Kings of England was perhaps against him rather than in his favour. Genealogy, however, is in general one of Mr. Bailey's strong points, and he has worked out his entire subject carefully, and stated his views clearly. Those views agree substantially with the doctrine of succession as stated by another constitutional lawyer, Mr. Taswell-Langmead, in his recent Constitutional History. The path which Mr. Bailey has trodden is indeed, as he says, "strewn with embers under which still smoulder controversial fires." It is all the more important therefore, that it should be trodden by men who bring to their work the acumen of legal practice in addition to the training of Alma Mater.

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*The Law of Domicil*, as a Branch of the Law of England, stated in the form of Rules. By A. V. DICEY, B.C.L., Barrister-at-Law; formerly Fellow of Trinity College, Oxford. Stevens and Sons. 1879.

Few questions are more difficult to answer than the question, "What is Domicil, and how should it be defined?" Perhaps no definition has yet been given which is not open to some objection, and certainly the discussion of the Law of Domicil, and its reduction, so far as English Law is concerned, to a body of Rules, forming, as it were, a species of Digest of the Law, was a work worthy of the labour of a highly-trained legal mind. We are glad that Mr. Albert Dicey should have given his attention to this subject, and we welcome the publication of his able and scholarly work. Although treating his subject "as a Branch of the Law of England," Mr. Dicey has been inevitably led to produce a book which is also, to some extent, a treatise on an important branch of International Law. At least eleven out of the twelve valuable "Notes," printed at the end of the volume, have a direct bearing on the Conflict of Laws arising between States, and several of them contain useful statements of Foreign Law. Our old friend *Sottomayor v. De Barros*, of course, appears and reappears in Mr. Dicey's pages. We have never been able to free our own minds from a certain dubiety whether the law of Portugal on the subject of the marriage of first cousins is strictly what it has been stated to be. We doubt whether there is a distinct prohibition by the Civil Law, like the Virginian prohibition of intermarriage between the white and black



ances. We think it is *only through giving effect to the Canon Law* that Portuguese Law can be said to prohibit the marriage of first cousins; in other words, we question whether the incapacity is not canonical rather than civil.

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*A Practical Treatise on the Law of Rating.* By EDWARD JAMES CASTLE, of the Inner Temple, Barrister-at-Law. Stevens & Sons. 1879.

Mr. Castle has undertaken to produce a general Treatise on the important and somewhat intricate branch of English Law which deals with Rating, and has accomplished his task with considerable success. The work is ably executed throughout; and while exhaustive in its treatment, and in some respects, as in setting out some of the judgments in decided cases, unusually full, is nowhere needlessly diffuse. The book is divided into two parts, treating respectively of Occupation and Rateable Value. In Part I. in addition to the subject of occupation *per se*, the various descriptions of rateable property are discussed, together with the statutable and other exemptions from rating. The important Rating Act of 1874, which, among other provisions, abolished the exemption which all mines other than coal mines had enjoyed under the Act of Elizabeth, is set out *in extenso* in the text with a full commentary. Mr. Castle's English in introducing this Statute seems hardly to express his meaning. He regrets that the Act of 1874 did not bring into rating, market tolls, ferries, "and other properties apparently that upon principle ought to be rated." Now he evidently meant to write "properties that apparently upon principle ought to be rated." In Part II. Rateable Value is considered under all its various aspects, concluding with a useful chapter on Deductions. As a whole we believe this book will be found of practical value not only to the lawyer, but also to landowners and agents.

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*A Draft Code of Criminal Law and Procedure.* By EDWARD DILLON LEWIS. C. Kegan Paul and Co. 1879.

No apology was needed for the continuance by Mr. Lewis of the work into which he had already gone at some length when the fact became public that Government had taken up the question of Codification, and that Sir James Stephen had been entrusted with the task of preparing the Government Draft.

For such a work as this, in a country like ours, where Codification is still in embryo, and where public discussion has to be invited, and Parliamentary discussion to be faced, it is not too much to say that the more labourers we can have in the field the better will be our chances of ultimate success. We can well believe that Sir James Stephen himself, together with his eminent colleagues in the Revision of the Criminal Code Bill, will be far better pleased at the publication of Mr. Lewis's Draft than they would have been had he decided that it would be a work of supererogation. Some of the proposals put forth by Mr. Lewis are, so far as we know, peculiar to himself. He would, for instance, do away with the present Court for Crown Cases Reserved, while, on the other hand, he would constitute, out of existing materials, with slight additions, a new Supreme Court of Criminal Judicature, embracing a High Court of Criminal Justice, and a Court of Criminal Appeal. This alteration could, he thinks, be effected with little difficulty, and its result would be so to lighten the labours of the existing Judicial staff that the work in the Civil Divisions would be got through much more expeditiously. It may seem a pity that while he was about it, Mr. Lewis did not, among other changes, propose a change of style in the entire Judicial system. No practical benefit, and much unpractical confusion, is the only result that we can see from the certainly clumsy nomenclature given us by the Judicature Acts. It requires a mind of more than ordinary analytical power to distinguish the possible functions of a "High Court of Justice" from those of a "Supreme Court of Judicature," whether in Civil or Criminal Law, and we really can see no reason why it should be a mode of designation "*individuum vitæ consuetudinem continens*." The old "Supreme Court of Sudder Dewannee and Sudder Foujdaree Nizamut Adawlut," at Fort William, certainly seemed to grow downwards rather than upwards when it became the "High Court of Justice" there. Several of the points raised by Mr. Lewis in regard to our existing Criminal Law have been the subject of keen discussion among Criminalists both in our own country and abroad. The present rules respecting the exemption of lunatics, which may perhaps be said to share in the difficulties that surround the entire subject of lunacy in relation to the law and its administration, have been considered from the point of view of French Jurisprudence, by M. Babinet, a distinguished Councillor of the Court of Cassation in Paris, to whose views and criticisms we drew attention in our issue for February last

(*Law Magazine and Review*, No. CCXXXI., Art., Criminal Law Abroad and at Home). The question what is legal lunacy, and what are the proper provisions to be made with regard to it in a Criminal Code, is at the present time, as we pointed out, engaging the attention of the French Government. Other important questions regarding Codification in general, and our own Criminal Codification in particular, have been on various recent occasions treated by French Jurists, such as M. Bertrand, one of the Editors of the Official French version of the Austrian Code of Criminal Procedure, and M. Georges Louis, one of the Secretaries of the Committee of Foreign Legislation, at the Ministry of Justice. It would have added to the scientific interest of his valuable book if Mr. Dillon Lewis had noted some, at least, of these foreign criticisms, and stated his own views on the points raised. We do not doubt that Mr. Lewis's own work will be studied with much interest abroad as well as among ourselves, and we are sure that his labours will be duly appreciated by Penalists in all countries, whatever be their direct effect upon the reform and the Codification of English Criminal Law.

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*Transactions of the National Association for the Promotion of Social Science.* Cheltenham Meeting, 1878. Longmans & Co. 1879.

The last Congress of the Social Science Association had the advantage of being presided over by one of its original members, Lord Norton, so long well known in his various official positions as Sir Charles Adderley. It is interesting to read in his opening Address the thoughts of one of our earliest "Moral Pokers" on the principal topics falling under the discussion of the meeting. The year of the Cheltenham Congress was also the year of the meeting of the International Prison Congress at Stockholm, to which the Association had sent several Delegates. The Report of those Delegates is printed in the present volume, but it is singularly meagre, and bare of such useful criticisms on the Congress as are to be found in the *Rivista di Discipline Carcerarie* of Rome, the *Revista de los Tribunales* of Madrid, and other foreign periodicals. Dr. Wines's Paper on the subject gives a brief synopsis of the general tenor of the conclusions of the Congress, and the discussion upon it records the views of some who were present at Stockholm. Mr. H. W. Freeland, in a paper on the International Tribunals in Egypt, recommends the establishment of a somewhat similar system in European Turkey and

Asia Minor ; a suggestion which it would in all probability be almost necessary to carry into effect if anything is to come of the Reforms in Administration promised by the Porte and guaranteed (?) by the Anglo-Turkish Convention.

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*Introduction to the Study of International Law.* By THEODORE D. WOOLSEY. Fifth Edition, revised and enlarged. Sampson Low & Co. 1879.

When we remember the modest dimensions of President Woolsey's early editions, the size of the goodly volume which he now publishes will be significant alike of the author's increased labours in his special portion of the field of Jurisprudence, and of an increase of public interest in the subject. Dr. Woolsey has brought out what will, he believes, most probably be the last edition he can hope to revise for press. We shall be very glad if he falsifies his own expectation in this respect. The book as now presented to the reader is an excellent and masterly compendium of the doctrines and practice of that "*Jus inter Gentes*" which, starting from the nations of Christendom, is to all appearance beginning to make its way even among the long secluded nations of the far East, as well as among the Mohammedan States, which have been almost driven to its recognition by their constantly growing intercourse with the Western Nations. We learn from Dr. Woolsey's pages with no small pleasure, that a Chinese translation of Wheaton's Elements is stated to be in preparation. And we have heard with no less pleasure of Chinese Envoys to Europe taking pains to obtain the best information concerning the nature and scope of the European Law of Nations from some of those most competent to explain it to them. These facts, though not much dwelt upon by Dr. Woolsey, augur well for the future of this branch of the Science of Jurisprudence. Few of us, in presence of the grave difficulties which confront the principal European Governments in Eastern Europe, in the Levant, in Egypt, in India, in South Africa, would venture to assert to the probability of a speedy Reign of Universal Peace. But although the legend "Pax" may not much more fitly be inscribed on the coins of Victoria, or Alexander, or William, or Francis Joseph, than it was on those of Harold, son of Godwin, yet the aspiration which that legend symbolised may well be kept in view as something to be striven for, even though it be not attained. And towards the attainment of this object the careful study and no less careful

carrying out of the principles of the Law of Nations cannot but be a powerful help. That it must also be enlarging to the mind, as is urged by Dr. Woolsey, we should hope scarcely needs demonstration. How much some such study is needed, the very works which hold a prominent position on the shelves of the student of International Law themselves not unfrequently show. We are greatly indebted to American writers for the progress of the science; it needs scarcely be observed that their nationality is occasionally very patent. We think that on some points Dr. Woolsey in his latest edition falls short of the Judicial calm and impartiality almost invariably preserved by Wheaton and Lawrence. When Dr. Woolsey plainly intimates his opinion that the Confederate States had by their secession from the Union lost all rights "except those of humanity," we are tempted to ask whether recognition as a belligerent is not a "right of humanity," which even a revolting community is entitled to expect at the hands of other Communities? Clearly humanity has still much to learn if this be not allowed. Again, when Dr. Woolsey comes to treat of what he calls "the Doctrine of Continuous Voyages," we are amazed to find in his pages no hint whatever of any other view later than that of Lord Stowell, save an extract containing a somewhat ingenious representation of Dr. Gessner's opinion which almost seems to convert the distinguished German Publicist into a supporter of the view which he strenuously opposed. And of the luminous exposition of the subject given by Sir Travers Twiss, first at the Antwerp Conference of the Association for the Reform and Codification of the Law of Nations, and afterwards, at considerably greater detail, in an article in our own pages (*Law Magazine and Review*, No. ccxxvi., November, 1877), we are equally astonished to find no mention made. Dr. Woolsey, in fact, assumes it to be British doctrine that if there is war between say Russia and Turkey, and a British or French vessel, being neutral, is found sailing to Genoa, a neutral port, the ship may be made valid prize with her cargo by a Russian man-of-war, on the ground that the cargo might "*ex hypothesi*" be trans-shipped at Genoa for Constantinople, or another enemy's port. We shall be very much surprised if Dr. Woolsey finds this doctrine generally accepted either by Great Britain or by Europe. The difference between "*proving beyond doubt*" that a particular cargo was destined for an enemy's port and use, and the "*mere suspicion*" of it (as Mr. Beach Lawrence observes), from a destination avowedly

neutral, is so marked, that Dr. Gessner's limitation, which seems to President Woolsey "not a very practical one," appears to us to go to the root of the matter, which is to require judicial proof, and not to condemn on an assumption unsupported by evidence. Having thus intimated some of our divergences from Dr. Woolsey's views, we turn with all the more pleasure to other features of his book which deserve high commendation. We observe that a system, peculiar, we believe, to Dr. Woolsey, distinguishes his "List of the most important Treaties since the Reformation," published in Appendix II. to the present edition of his work. The arrangement is historical, and it is also that of a classed catalogue, which presents this great advantage, that all the chief provisions of the principal Treaties belonging to a particular period of history can be studied in their proper sequence and connection. Thus we find grouped together the Treaties belonging to the "Age of Religious Antagonism," the "Age of Louis XIV.," the "Age of the French Revolution and of Napoleon," and of the "Great System of Pacification and Re-Adjustment following on the Fall of Napoleon," &c., until we are carried down the stream of time to the Treaties of San Stefano and of Berlin, 1878. This Appendix alone would give a special interest to the new edition of Dr. Woolsey's valuable work, even if the book had not long ago established its right to high rank among practical manuals of International Law, useful not only for lawyers, but also, as its venerable author points out, for "all young men of liberal culture in preparation for any profession or employment." We cannot but hope that the number of such students may increase with the spread of "liberal culture" on both sides of the Atlantic, and throughout all the members of the Commonwealth of Nations.

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*The Jurisdiction, Process, Practice and Mode of Pleading in ordinary Actions in the Mayor's Court, London* (Commonly called the Lord Mayor's Court). By GEORGE CANDY, Barrister-at-Law. Stevens & Sons. 1879.

Mr. Candy here sets afloat what he modestly calls a "light craft," but one on board which, to continue his own metaphor, passengers bound for the Mayor's Court, London, will do well to secure a berth. In a year of "Light Blue" Victory at Putney, Mr. Candy seems to deem it well to hide under a bushel the fact that he himself is a "Dark Blue." To this reticence we object

on principle, considering that a University is either worth much or nothing as an index of culture, and, if the latter, that it ought not to cumber the earth with its existence. Having thus delivered our soul on a point not affecting Mr. Candy's merits as an author, we gladly give him great credit for a clear and, if it may be said with all due respect for the Bench, a frequently somewhat amusing analysis of the "chaos" of conflicting decisions, amounting at one time almost to the proportions of a "grave scandal," in the opinions of the judges themselves, through which the Mayor's Court has had to pass before reaching its present high pitch of acceptableness to a large and increasing number of suitors. Mr. Candy's work is "founded on Brandon," but on this sound basis a superstructure has been raised which is entirely his own, and of which the identity is unmistakeable. Mr. Candy objects to the phrase "Lord Mayor's Court" as misleading. It is of course historically true that the title of "Mayor" or "Port-reeve" is older than that of "Lord Mayor." But by whatever name it be called, practitioners and suitors will alike find Mr. Candy's book an excellent guide to the Jurisdiction and Practice of the "Court of our Sovereign Lady the Queen," holden before the Lord Mayor and Aldermen in the Chamber of the Guildhall in the City of London.

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*Annuaire de Législation Etrangère.* Publié par la Société de Législation Comparée. Paris. Cotillon. 1878.

The seventh issue of this most instructive and valuable Jurist's Year-Book, as it might fairly be called, contains a perfect mosaic of Comparative Legislation, constructed by skilled hands from the materials richly furnished by the Legislative activity of the year of grace, 1877. The "Hellenic Factor" in the Eastern Question is represented by an Electoral Law, translated by Timoleon Philemon, Deputy for Attica, and a résumé of the Work of the Chambers for 1877, by Professor Calligas, of the University of Athens, a combination of titles which seems to bring before us dreams of the Agora and the Pnyx, of the Academy and the Porch. The Sublime Gate of Felicity, not to be outdone by the many-wiled Hellene, sends us Administrative Laws for the police of the New Rome, and a reminiscence of the late war in the shape of the Decree constituting a Maritime Prize Court at Constantinople, a Tribunal whose members must have enjoyed a tolerable sinecure. The Patent Laws of the German Empire are most elaborately and



judiciously annotated by the very competent pen of M. Charles Lyon-Caen, Agrégé of the Paris Faculty of Law, who has made this subject peculiarly his own. Our own Legislative work in Parliament during the year 1877, is ably treated in a general notice by M. Lebel, and in several of its chief details by M. Babinet and M. Bertrand, whose views on English Criminal Codification we have already brought before our readers.

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#### OUR FOREIGN CONTEMPORARIES.

Since we were last able to devote some space to the general consideration of the progress of our Juridical Contemporaries on the Continent, apart from the mention which we have given from time to time of special articles, changes and developments have been carried out in the conduct of several among them, and we are glad to record that they have only indicated fresh vigour. The *Revue de Droit International* (Gand, Rue de l'Université), has lost the Editor-in-Chief who had so long been its presiding spirit as he had been its founder. But the mantle of M. Rolin-Jacquemyns could scarcely have fallen on better shoulders than those of his successor in office, M. Rivier, Professor of Roman Law in the University of Brussels, who succeeds him also as General Secretary of the Institute of International Law. The articles published under Professor Rivier's editorship have been both varied in their matter and instructive in their mode of dealing with the subjects discussed. It has been a source of sincere pleasure to us to find that the views of Professor Esperson, of Pavia, on the question of the Capitulations in Cyprus (*Revue*, 1878, commencing at p. 587), accorded in the main with those to which expression was being given contemporaneously in our own pages. And we are glad to note that the interesting article by M. Ernest Nys, on the Papacy and International Law (*Revue*, 1878, commencing at p. 501) has been translated into English, and republished in pamphlet form (*The Papacy considered in Relation to International Law*, by Ernest Nys, Docteur en Droit; Translated from the French by the Rev. Ponsonby A. Lyons. Henry Sweet. 1879), so as to be more generally accessible. The names of such writers as Professors Bluntschli, of Heidelberg; Henri and Charles Brocher, of Geneva; Bulmerincq, formerly of Dorpat; Hon. W. Beach Lawrence; M. Asser, of Amsterdam; Mr. Westlake, Q.C., and Prof. Holland, and others who have contributed during the past



year, would suffice, were it necessary, to guarantee at once the continued value and the continued International character of the Review. M. Rivier's own signed contributions, during this period, though not numerous, have included a wide survey of the field of International Jurisprudence, and able summaries of the results of several of the most important International Congresses held in 1878.

The *Nouvelle Revue Historique de Droit Français et Etranger* (Paris. Larose: Rue Soufflot) has devoted considerable space to articles which show its continued title to the epithet Historical, always a leading feature in its various former issues, under the fostering care of M. Laboulaye, M. de Rozière, and others. We draw attention elsewhere to an erudite dissertation by M. Jacques Flach, one of the editors, on a question of Juridical Epigraphy, connected with the Mining Laws of the Roman Empire. M. Fustel de Coulanges, the eminent author of "La Cité Antique," so well known to all students of Archaic Jurisprudence, has contributed a valuable article on Drawing by Lot, as applied to the Nomination of the Archons of Athens. M. Crémazy, in an article on Mussulman Law in French India, gives us information on a subject upon which it is not easy to find authorities in this country. M. de Rozière, in a paper on the Ancient Statutes of the City of Rome, read before the Academy, discusses the recent researches of Sig. Vito La Mantia, in the course of which the Cardinal Secretary of State allowed him three hours for the perusal of a MS. in the Vatican Library! Fortunately there are other MSS. at the Capitol and in the Ottoboni Library. But we certainly re-echo the wish of M. de Rozière that a day may soon come in which the Vatican shall throw open its doors to the student.

The *Revue Générale du Droit, de la Législation, et de la Jurisprudence* (Paris. Thorin: Rue Médicis), has paid attention to Law and Jurisprudence in all countries during the past year, and its choice of subjects has been extremely varied. As a rule the articles are relatively brief, and therefore more numerous than our system admits. Sir H. Sumner Maine's Oxford Lectures on the Juridical Organisation of the Family among the Slavs and Rajputs, among the latest and not the least interesting fruits of his studies, have been translated in the *Revue Générale*, and are about to appear in a collected form in French, with a preface from the learned pen of M. Fustel de Coulanges. M. Georges Louis, whose works on the English Criminal Code Project, and other subjects, we have already had occasion to

notice, contributes a summary of Foreign Legislation in 1877, for which his official position as one of the Secretaries of the Departmental Committee on that subject, at the French Ministry of Justice, gave him an especial fitness. M. Crémazy has treated the Hindoo Law in force in French India, with the same aptness as he discussed the Mohammedan Law of that colony in the *Nouvelle Revue Historique*. M. Fliniaux, the author of a work on the Law of Copyright which we have already more than once cited in these pages, has added to the growing literature of this subject two articles in the *Revue Générale* (Jan.-Feb., and March-April, 1879), to which we shall probably have occasion ere long to draw the attention of our readers more specially.

The *Journal de Droit International Privé* (Paris: Marchal et Billard, Place Dauphine), has added Sir Robert Phillimore and Mr. Beach Lawrence to the number of those distinguished Jurists under whose patronage it is published. We have alluded elsewhere in our current number to the part which its editor-in-chief, M. Clunet, has taken in various meetings recently held in London, and also to some of the principal articles which have appeared in its pages. It may therefore be sufficient to say here that the practical utility and literary ability of the Journal continue to be of a high order in all questions relating to Private International Law.

The *Rivista di Discipline Carcerarie* (Roma: Tip. Artero), edited by the Inspector-General of Prisons for the Kingdom of Italy, has, as might have been expected, given a good résumé of the proceedings of the Stockholm International Prison Congress, of which its editor, Commendatore Beltrani Scalia, was himself one of the official members. But its value has by no means been confined to this one point. In many other matters connected with Penal Law, and its administration in the various States of Europe, the *Rivista* has maintained its position as one of the best and most authoritative sources of information.

The *Revista de los Tribunales* (Madrid: Puerta del Sol, 13), edited by Don Vicente Romero y Giron, assisted by other distinguished Spanish Jurists, has given proof (noticed by us elsewhere) of wide-reaching sympathies in all matters relating to Jurisprudence and the administration and reform of the Law. Carried on in its present spirit, the *Revista* cannot fail to be a powerful auxiliary in the necessary work of Law Reform and Codification in Spain. We wish it all success as a high-class literary organ of Spanish Jurisprudence.

## Quarterly Notes.

The erroneous statement, due to a mistake of a telegraph operator, that the Basque Provinces were to be placed in a state of siege during the elections, perhaps served to draw more attention to Spain than it might otherwise have received during the Parliamentary crisis. Some of the questions treated in our able contemporary the *Revista de los Tribunales*, will, we think, be found to deserve study, as throwing considerable light on the progress of Spanish Thought on important Juridical and Political problems of the day. In several of its numbers, published during the last half of 1878, the Review which we cite has discussed the *Reform of Legal Study*, a subject fruitful of interest, and treated by the practised pen of Manuel Torres Campos: the *Scientific Development of the Fundamental Conception of Law in the 19th Century*, an elaborate Essay, in which the principal modern theories are passed in review, by Sr. Duran-y-Bas: besides publishing a Discourse, pronounced at the opening of the Session of the Madrid Scientific and Literary Athenæum, by Sr. Moreno Nieto, on *The Modern Political Problem*. It has also translated, and to that extent made its own, an Italian view of *The Just Representation of all Electors*, by Dr. Attilio Brunialti. Under the present circumstances of the country in which these various subjects have been given a prominent place in Legal Literature, it may not be without interest to see what is the line of Juridical and Political Reform which appears to commend itself to the mind of cultured Spain. Dr. Brunialti's Essay is specially introduced by an editorial note, as germane to the consideration of the Electoral Law actually in preparation. Although, therefore, it was written in view of the modification of the laws of a different country, its publication under its new form shows that its matter was held applicable to the case of Spain. "If it be conceded," says the writer, "that some Electoral Reform will shortly take place, of what kind will it be? Will it be limited to increasing the number of the electors, or will it go further, and attempt to secure the just representation of all electors?" This last, of course, is the goal at which both Dr. Brunialti and the *Revista de los Tribunales* aim.

It is interesting to observe that Dr. Brunialti claims for Electoral Law Reform that it is of no party. "Liberals and Conservatives," he says, "alike agree in this, if in nothing else. That is a remarkable fact to start with, and one which ought to secure the attainment of the desired object by the most expeditious and least dangerous road possible. That the Elective Chamber as distinguished from the Senate, the House of Commons as distinguished from the House of Lords, ought to be the true representative of the body from which it derives its being (*i.e.*, the People), is an axiom of Dr. Brunialti which no one accustomed to Constitutional Government would for a moment deny. It is on the further question, how best to make the Elective Chamber thus truly representative, that differences of view make themselves manifest. That in any deliberation the voice of the majority must prevail is self-evident. It was so in the Agora, and in the Landsgemeinde, and it must be so in all Representative Assemblies. But the minority now-a-days rarely secedes, though we have had one great recent example. Under Representative Institutions, Dr. Brunialti points out there is necessarily a certain loss of personal power. In the Agora or the Landsgemeinde each citizen could influence the debate by his speech. But when he has entrusted his vote to a representative he has lost a proportional part of his influence. The decision belongs of right to the majority, but representation is the right of every elector. The Genevan Publicist *Considérant*, wrote to his countrymen in 1846 that the confusion of two entirely distinct things, the representative vote and the deliberative vote, was a fundamental error of modern times. In similar strains M. Naville wrote that the confusion of these two ideas not only created fictitious majorities, but also took away from the minority the sovereign right of decision. And Louis Blanc, in 1848, declared that the "absolute reign of the majority over the minority is not the Government of the People by itself, but simply the Government of the lesser number by the greater." It may be well to remember that Bluntschli may be cited in the same sense.

The principal Electoral systems of Europe and the United States are passed under review by Dr. Brunialti. His favourite, after weighing all the chief *pros.* and *cons.*, is Hare's Quotient, with modifications. This system Brunialti regards as an ideal towards which approximation may gradually be made through the diffusion of popular education. In fact it may be said that his scheme is Proportional Representation

But what, we may inquire, is the precise meaning to be attached to this phrase? Does the proportion apply to numbers only, or to education, general and political, and social position? The answer seems in truth to be that each of these is to be considered to a certain extent as a factor in the perfect or ideal scheme of Representation. When first introduced into political language, or rather, perhaps, into the language of Electoral Reform, the word "proportional" appeared, says Brunialti, to be accurate: to say proportional representation was, at any rate, an advance on the expression "representation of minorities" previously employed, because, as Hare observes, "the question is not one of majorities and minorities, but of an Electoral body with all its shades of opinion, which, when they reach a certain development, have a right to representation." Nevertheless, Brunialti admits that objections may be brought against the use of this expression, which it is contended ought not to be used in its formal sense, but rather as Mill and others would use it, in its relation to the imposts which the elector pays, and to his intellectual capacity and social position. This may seem something of a change of front; but it is perhaps one not unknown in other branches of "practical politics." The expression which Brunialti himself favours, and thinks best adapted to set forth the true bearing of the reform he desires, is "the just representation of all electors." What this name fails in as a reform cry seems to be its length. "Proportional representation" is a phrase that may easily be *in ore omnium*. Dr. Brunialti's amendment is one rather for the student of (shall we say?) theoretical politics. The quotient system has been tried we learn, in several societies and clubs in Italy, and been found to work well. On the other hand, the existing system is, in Dr. Brunialti's eyes, condemned by the logic of facts, such for instance as he finds ready to hand in the figures of recent elections in Great Britain, and the United States, as well as in Italy and Germany. Then, taking his figures as they would work on the Hare system, Brunialti shows us what would be the results in a given borough in Italy, choosing Vicenza as his example with a body of 9,540 electors, seven deputies to elect, and three parties dividing the votes. If 4,320 are recorded for the A. side, 3,750 for B., 1,470 for C., the total number of electors divided by that of the deputies gives a quotient of 1,363, which goes 3 times in 4,320 (A.), twice in 3,750 (B.), once in 1,470 (C.). Hence the result is arrived at that the A. party has a right to three deputies, the B. party to two, and C. to one. It

would seem as though this amount of representation ought to satisfy everybody, though it may be observed that one deputy (probably a neutral) is not reckoned. For this apparent omission we are not accountable.

Turning now to the question what chance this "ideal system" has of being carried out in practice, Dr. Brunialti seems to us to rely greatly on the fact that compromise enters largely, and that of necessity, into our administrative systems. The many objections which can be brought forward, the many difficulties which can be raised, are not passed over. But the advocate of Hare's system thinks, with Stuart Mill, that it deserves as much consideration in the region of politics as railways and telegraphs among material reforms. Calhoun said that Parliamentary government was a government of compromise. It is argued, we presume, by the advocates of proportional representation that when they are strong enough they will find their opponents ready to give in. Whether this will first be the case in Italy or in Spain, we do not presume to forecast. But that the day will come when the "just representation" which he supports shall be adopted, Dr. Brunialti is firmly convinced. It will be with representation, he believes, as with Mont Blanc. A few years ago how few were the climbers! Yet now whole bands of friends are constantly making the ascent. "Excelsior" thus seems to be the cry of the advocates of this Electoral Reform which is to make us all satisfied with ourselves and with others.



The subject of Copyright has been lately brought before the Law Amendment Society, through a paper by Mr. J. Leybourn Goddard, who enjoyed the special advantage of having been Secretary of the Royal Commission. In the course of his Paper Mr. Goddard showed by some amusing instances what a dense ignorance prevailed in many minds as to the nature of Copyright, requests having been freely made to the Secretary that he would "take out Copyright" for certain persons, as though he were a Registrar of Patents for Inventions. Mr. Goddard manifested the bent of his own views as being strongly on the side of Sir Louis Mallet, who appended a separate Report of his own, advocating the Royalty system. This plan is also supported by Mr. Macfie, of Dreghorn, in the first volume of a book on "Copyright and Patents for Inventions" (Edinburgh, T. & T. Clark. London: Hamilton & Adams), in which he

has reprinted an Essay on Literary Property, by Lord Dreghorn of the Court of Session, first published in 1772, founded on notes of the pleadings of the learned Judge as Counsel in an Edinburgh "cause célèbre," turning on the interpretation of the 8th of Anne. The Royalty system does not want for ability in its advocates, but it does not appear to have the command of anything more than a respectable minority in this country. Sir Travers Twiss, who presided over the Law Amendment Society's meeting, gave a lucid résumé of modern Continental Legislation on the subject, including in his survey some Legislations which had escaped the attention of the reader of the Paper. Sir Travers's own view appeared to be rather in favour of a definite period, irrespective of the author's life, and for which he suggested that sixty years would be a suitable limit. We still think, however, that the conditions of existing European Legislation being, as we have already shown in these pages, based on the author's life, render that the only practicable basis for International Conventions. In the discussion, which was very well sustained, several interesting facts were brought out. M. Clunet, editor of the "Journal de Droit International Privé," gave a most graphic sketch of the position taken up by French Artists at the Art Copyright Congress in Paris last year, and stated that there were good grounds for believing the present Belgian Government to be favourable to the idea of an International Copyright. He also confirmed the fact that the Spanish Bill (printed by us, *Law Magazine and Review*, No. CCXXIX., August, 1878) had passed into law, and that therefore the duration of Copyright in Spain has been extended from fifty to eighty years. Mr. Carmichael showed, by reference to the action of recent Congresses on Literary and Artistic Property, and the Bills laid before several Continental Parliaments, that the tendency of modern Legislation was to increase the duration of Copyright, and expressed the view that the term proposed by the British Royal Commission would not be found adequate to meet this tendency. Dr. Tomkins gave some of his experiences of one of the earliest meetings in favour of International Copyright, held in the United States, and believed that the feeling there was now much stronger in favour of coming to an agreement. The discussion mainly took an International view of the question, which is the view most requiring immediate attention, but also the one which the reader of the Paper, in his reply, said that he had especially endeavoured to avoid. But some subjects refuse to be thrust aside.



The Second Session of the International Literary Congress has been held in London, under the presidency of M. Edmond About, M. de Lesseps, &c., in the enforced absence of Victor Hugo, owing to Parliamentary engagements. The questions dealt with were connected with Translation and Adaptation. We were sorry to observe two things about the London meeting, viz., the absence both of the English men of letters, who might have been expected to take part in the discussions, and of the greater number of the French Jurists who took part in the Foundation Congress in Paris last year. Although we did not find ourselves able to agree with some of the views expressed and the arguments advanced by members of the French Bar last year, those views and arguments were always lucidly put, and the mere habit of mind of the advocates often enforced upon the meeting the necessity of adhering to the subject under discussion. In the London Congress we had to deplore the want of method and order which frequently made it impossible to discover what was before the House. We were unable even to obtain from the Secretaries authentic copies of the Resolutions passed, and we fear that the conditions under which we saw some of them passed must disentitle them to that weight which the well-considered opinions of an International assembly would legitimately possess. This is the more to be regretted, because the objects of the Congress, and of the International Literary Association which it has founded, are in themselves such as command our sympathy, and we think the journal published by the Association (*Bulletin de l'Association Littéraire Internationale*, Paris, Secrétariat, 14, Rue Lepic) is deserving of support as a medium of inter-communication on the subjects taken up by the Congress. But from a literary point of view the "Bulletin" stands as much in need of revision as the Congress itself does from the point of view of order and method.

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The Seventh Conference of the Association for the Reform and Codification of the Law of Nations, to be held at the Guildhall, in August, sets forth in its programme an ample field for the useful occupation of the jurists, bankers, merchants, and others interested in the various branches of International Law. The eminent names to be found on our side, including, as Presidents, the Lord Chief Baron, the Right Hon. Sir Robert Phillimore, and Sir Travers Twiss, augur well for the scientific



aspect of the meeting as a Conference on International Law. The foreign contingent, it is to be hoped, will muster in equal strength, so as to ensure the representative character so essential to such gatherings. We observe some new features in the programme, *e.g.*, International Rules of Quarantine, a subject on which Sir Sherston Baker has recently published a valuable manual, noticed elsewhere in our present issue; Uniform Standards of Weight and Measure; the International Maintenance of Lighthouses; and the International Protectorate of Telegraphic Communications, a subject closely connected with the recent International Telegraphic Conference.

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THE  
Law Magazine and Review  
Quarterly Digest  
OF  
ALL REPORTED CASES,  
IN THE  
LAW REPORTS, LAW JOURNAL REPORTS, LAW TIMES  
REPORTS, AND WEEKLY REPORTER,  
WITH  
COLLECTIVE TABLE OF CASES AND INDEX OF SUBJECTS.

VOLUME IV.

AUGUST 1878—AUGUST 1879.

BY  
HENRY M. KEARY,

Of Lincoln's Inn, Esq., Barrister-at-Law.

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# Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times  
Reports, and Weekly Reporter.

By HENRY M. KEARY, of Lincoln's Inn, Barrister-at-Law.

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1878.\*

## Administration:—

- (i.) **C. A.—Advancement—Annuity—Statute of Distributions.**—A father covenanted, by deed, to pay each of six daughters an annuity of £200 for life, provided that the income of any property he might thereafter settle on any of them should be taken *pro tanto* in discharge of the annuity: he died intestate: *Held* that the annuities paid during his life were not advancements, and that the subsisting annuities, the value being calculated at his death, should be brought into hotchpot.—*Hatfield v. Minet*, 47 L.J. Ch. 612.
- (ii.) **P. D. A. Div.—Executrix—Renunciation.**—A sole executrix and universal legatee renounced her rights to administration which was granted to one of the next-of-kin, who died insolvent and intestate: the executrix was allowed to take administration *de bonis non*.—*In the goods of Wheelwright*, L.R. 3 P.D. 71.
- (iii.) **P. D. A. Div.—Executrix—Will of Married Woman.**—B.'s widow and sole executrix married S., and made a will under certain powers, during coverture, appointing S. sole executor, and on her death administration with will annexed was granted to S.: *Held* that a further grant was required to the unadministered effects of B.; grant made to B.'s daughter, who was residuary legatee.—*In the goods of Bridger*, 47 L.J. P.D.A. 46.
- (iv.) **Q. B. Div.—Executor de son tort.**—B. having died intestate and insolvent, before administration was taken out, his widow was obliged to vacate his house, and removed some of the furniture to another house and sold the rest by auction: the proceeds of the sale, and the valuation price of the removed furniture, were given to the administrator, when appointed: *Held* that neither the widow nor the auctioneer were liable as executors *de son tort*.—*Peters v. Leader*, 47 L.J. Q.B. 573.

\* Cases reported only in the *Law Times Reports* and *Weekly Reporter* for October 26th are postponed till next Quarter.

- (v.) **P. D. A. Div.**—*Next-of-kin a Lunatic—Grant to Stranger.*—The sole next-of-kin of an intestate being a lunatic, administration was, with the consent of the lunatic's committee and next-of-kin, granted to a stranger in blood.—*In the goods of Hastings*, 39 L.T. 45.
- (vi.) **P. D. A. Div.**—*Next-of-kin a Married Woman—Husband Abroad.*—The sole next-of-kin of an intestate was a married woman living apart from her husband, whose address was unknown: she took a first life-interest in after-acquired property under her settlement: administration granted by consent to the trustees of her settlement.—*In the goods of Maychell*, 39 L.T. 94.
- (vii.) **Ch. Div. M. R.**—*Priority—Order Nisi to Sign Judgment—Transfer of Action*—32 & 33 Vict., c. 46.—An order nisi to sign judgment had been obtained against an executrix in the Ex. Div. for a balance due from her to the testator's estate: before judgment was signed, another creditor obtained an administration decree in the Ch. Div.: *Held* that the first creditor had no priority over the other creditors, and, on motion of second creditor, the action in the Ex. Div. was ordered to be transferred and proceedings stayed, the plaintiff to be at liberty to prove for claim and costs in the administration.—*Hanson v. Stubbs*, 47 L.J. Ch. 671.
- (viii.) **Ch. Div. V. C. M.**—*Priority—Second Creditor—Judicature Act, 1873, ss. 2, 25, sub-sec. 1.*—Section 25, sub-section 1, of the Judicature Act, 1873, came into effect on the passing of that Act.—*Hilton v. Jones*, 47 L.J. Ch. 740; 38 L.T. 808.

#### Agreements and Contracts:—

- (i.) **P. C.**—*Breach—Fraud—Release.*—In an action for breach of covenants in a partnership deed and for fraud in obtaining a dissolution, by the deed of dissolution the plaintiff had released defendant from all matters relating to the partnership: *Held* that as plaintiff was not in a position to rescind the contracts contained in the deed, the release was binding on him.—*Urquhart v. Macpherson*, L.R. 3 App. 831.
- (ii.) **Ch. Div. F. J.**—*Contract to Dedicate to Public—Notice.*—A., the lessee of land, made a contract to make and dedicate a road to the public, and made a road accordingly: afterwards he sold the lease to B.: in the plan annexed to the lease the road was marked private: *Held* that, though B. would have been put on inquiry by the words in the lease, "subject to existing rights of way," yet that the description of the road in the plan took away the effect of those words, so far as related to the road: and that B., having purchased without notice, the fact that C., a subsequent purchaser from B., had notice was immaterial.—*Attorney-General v. Biphosphated Guano Co.*, 38 L.T. 941.
- (iii.) **H. L.**—*Fraud—Trover.*—Blenkarn was convicted of obtaining goods under false pretences from plaintiffs by means of orders signed so as to look like "Blenkiron & Co.," a well-known firm: the defendants had *bonâ fide* purchased the goods from Blenkarn and resold them: *Held* (affirming the Court of Appeal, L.R. 2 Q.B.D. 96; 46 L.J. Q.B. 233; 36 L.T. 345; 25 W.R. 417) that the property in the goods never passed from the plaintiffs, and they were entitled to recover.—*Lindsay v. Cundy*, 47 L.J. Q.B. 481.
- (iv.) **Ch. Div. V. C. B.**—*Restraint of Trade—Trade Secret.*—A covenant in restraint of trade, though unrestricted as to locality, is reasonable and good if it relate to the use of a trade secret.—*Hagg v. Darley*, 47 L.J. Ch. 567.

#### Arbitration:—

- (i.) **C. A.**—*Agreement to Refer—Revocation*—17 & 18 Vict., c. 125, s. 11.—Where a contract contains an agreement to refer, one party cannot

revoke the agreement and bring an action: if he does, proceedings will be stayed under 17 & 18 Vict., c. 125, s. 11.—*Moffat v. Cornelius*, 26 W.R. 914; 39 L.T. 102.

- (ii.) **Ch. Div. M. R.**—*Removal for Unfitness—Injunction*—17 & 18 Vict., c. 125, s. 79—*Judicature Act*, 1875, s. 25, sub. 3. 8.—Injunction granted at the instance of a party to an arbitration, restraining an arbitrator from continuing to act, on the ground that it was not probable that he would faithfully discharge his duty.—*Beddow v. Beddow*, 47 L.J. Ch. 588.

**Banker:—**

- (i.) **P. C.**—*Branch Bank—Transfer*.—The holder of a promissory note presented it at the head office of the bankers of the maker, and they sent it to their branch bank where the note was payable, when it was cancelled by a clerk, and a draft transmitted in respect thereof to the head office, where payment was stopped: *Held* that the bank could not be charged with the receipt of the money.—*Prince v. Oriental Bank*, 47 L.J. P.C. 42.

**Bankruptcy:—**

- (i.) **C. A.**—*Appeal—Security for Costs—Ord. 58, r. 15*.—The Court of Appeal, but not the Bankruptcy Court, can, under special circumstances, increase the amount of a deposit after the entry of the appeal.—*Ex parte Cooper, Re Baum*, 38 L.T. 924; 26 W.R. 890.
- (ii.) **C. J. B.**—*Appeal from County Court—Time—Bankruptcy Rules*, 1870, r. 143.—The time for appealing from a County Court to the Chief Judge in Bankruptcy is unaltered by Rules of Court, 1875: the appeal must be brought within twenty-one days from the day on which the order appealed from is finally settled and signed.—*Ex parte Cochrane Re Sendall*, 38 L.T. 820; 26 W.R. 818.
- (iii.) **C. A.**—*Composition—Appeal—Costs*.—Costs of abortive appeal against registrar's refusal to register resolutions for composition are not proper costs incurred in relation to "pending proceedings" within, r. 292 of Bankruptcy Rules, 1870.—*Ex parte Hopper, Re Elliott*, 47 L.J. Bcy. 41.
- (iv.) **C. A.**—*Composition—Debt incurred by Fraud—Attachment*—32 & 33 Vict., c. 71, s. 12.—The provisions for the protection of a debtor in section 12 of Bankruptcy Act, 1869, and r. 289 of Bankruptcy Rules, 1870, do not apply to composition.—*Pashler v. Vincent*, L.R. 8 Ch. D. 825.
- (v.) **H. L.**—*Composition—Debtor's Statement*.—Pending an arrangement by composition, one of the creditors was liable on a contingency as surety for debtor on an Admiralty bond, which liability was not included in the statement of debts; but the creditor assented to the composition in respect of another debt: *Held* that the creditor having been called upon to pay the amount secured, under the bond could bring an action against the debtor in respect thereof.—*Breslauer v. Brown*, L.R. 3 App. 672; 39 L.T. 67.
- (vi.) **C. A.**—*Composition—Default—Proof—Notice—Act of Bankruptcy*.—Where creditors agree to accept a composition payable by instalments, some of which are guaranteed by a surety, if default is made in the payment of any instalment, the creditors may prove in the debtor's bankruptcy for the whole balance on their debts, without refunding the instalments received. (Notice of an act of bankruptcy available for adjudication in sections 94 & 95 of the Bankruptcy Act, means notice of an act of bankruptcy which would have been available for making the adjudication actually made).—*Ex parte Gilbey, Re Bedell*, 47 L.J. Bcy. 49.
- (vii.) **C. J. B.**—*Costs—Shorthand Notes*.—Costs of transcript of shorthand notes of evidence are, in the discretion of the judge, within r. 188 of Bankruptcy Rules, 1870.—*Ex parte Smith, Re Albezette*, L.R. 8 Ch. D. 599.

- (viii.) **Ch. Div. V. C. B.**—*Discharged Bankrupt—Taxation—Party Interested*—6 & 7 Vict., c. 73.—A bankrupt is not entitled after discharge, though his creditors have been paid in full, to demand delivery and taxation of a bill of costs paid by the trustee out of the estate.—*Re Leadbitter & Harvey*, 39 L.T. 12; 26 W.R. 853.
- (ix.) **C. J. B.**—*Discharge—Certificate—Refusal of Creditors.*—When a bankrupt's creditors refuse to grant him a certificate, the Court has no power to order his discharge in the absence of improper conduct on the part of the creditors.—*Ex parte Chesney, Re Dempster*, 38 L.T. 887; 26 W.R. 833.
- (x.) **C. A.**—*Execution—Composition.*—Where a sheriff who has seized goods of a trader, under a *fi. fa.*, for an amount exceeding £50, receives notice within fourteen days of a bankruptcy petition against the trader having been presented, and a resolution for composition is duly passed and registered, the sheriff ought immediately to pay the proceeds to the execution creditor.—*Leader v. Knight*, 26 W.R. 897.
- (xi.) **C. J. B.**—*Execution—Reduction of Claim—Bankruptcy Act, 1869, s. 87.*—A creditor who has sued a trader for a debt, and signed judgment for more than £50, may avoid the operation of sec. 87 of the Bankruptcy Act by issuing execution for less than £50.—*Ex parte Berthier, Re Hinks*, 47 L.J. Bcy. 64.
- (xii.) **C. J. B.**—*Execution—Seizure without Sale—Costs.*—A sheriff's officer seized goods of a debtor under a *fi. fa.*, and advertised them for sale: the debtor filed a liquidation petition, and the sale was restrained: *Held* that the costs of the seizure and announcement of sale must be paid by the trustee under the liquidation.—*Ex parte Browning, Re Craycraft*, L.R. 8 Ch. D. 596.
- (xiii.) **C. J. B.**—*Execution—Sum under £50—Possession Money.*—Execution was taken for a sum under £50, and the debtor having become bankrupt an injunction was granted restraining sheriff from dealing with the goods, and he remained in possession till the injunction ceased, when, with the addition of the possession money, the sum exceeded £50: *Held* that this was an execution in respect of a judgment for a sum exceeding £50 within section 87 of the Bankruptcy Act, 1869.—*Ex parte Lythgow, Re Fenton*, 38 L.T. 886; 26 W.R. 834.
- (xiv.) **C. J. B.**—*Lease—Disclaimer—Fixtures.*—A trustee in bankruptcy is entitled to remove tenant's fixtures after receiving notice to disclaim but before disclaiming.—*Ex parte Foster, Re Roberts*, 38 L.T. 888; 26 W.R. 834.
- (xv.) **C. A.**—*Liquidation—Discharge—Malpractice in obtaining Vote.*—Malpractice in obtaining a single vote is sufficient to vitiate a resolution for discharge of a debtor.—*Ex parte Baum, Re Baum*, 47 L.J. Bcy. 48.
- (xvi.) **C. P. Div.**—*Liquidation—Discharge—Omission from Debtor's Statement.*—A debtor who has obtained his discharge in a liquidation is not liable at the suit of a creditor who was omitted from debtor's statement and had no notice of the proceedings where the debt was provable in liquidation.—*Elmslie v. Corrie*, 39 L.T. 107.
- (xvii.) **C. A.**—*Liquidation—No Assets*—Where a debtor's statement shows that he has no assets available, and it appears that the procedure of the Court is resorted to for an idle purpose, the registrar ought not to register resolutions for liquidation by arrangement.—*Ex parte Aaronson, In re Aaronson*, 47 L.J. Bcy. 60.
- (xviii.) **C. A.**—*Liquidation—Release of Trustee—Non-payment of Rent.*—A liquidating debtor's trustee entered into possession of leaseholds occupied by debtor, but failed to pay the rent due for one quarter. After the debtor's discharge and the trustee's release, the landlord applied to the

Court of Bankruptcy for an order directing the trustee to pay rent : *Held* that either the landlord's remedy was a personal one against the trustee, or else that the trustee had only committed a default in the administration of the assets, from liability for which he was protected by the release.—*Ex parte Carter, Re Ware*, L.R. 8 Ch. D. 731.

- (xix.) **C. J. B.**—*Liquidation—Set Off—Mutual Dealings.*—A. agreed with B. to execute certain works, and that the plant brought on the works by A. should be deemed the property of B. and not be removed during the progress of the works without his consent, and in case of default by A. in performing the contract, the plant should continue to be used about the execution of the works : A. having failed to carry out the contract, another contractor was appointed and most of the plant used about the works, and the balance sold by agreement for £685 : B.'s engineer certified that £2,876 was due from A. for his default : A. having taken liquidation proceedings : *Held* that B. could not retain the £685 as a set off against the amount due to him.—*Ex parte Bolland, Re Winter*, 47 L.J. Bcy. 52.
- (xx.) **C. A.**—*Liquidation—Undischarged Debtor—New Trading.*—The creditors of a debtor having resolved on a liquidation, and that the debtor should have his discharge on the committee of inspection certifying that he was entitled to it, the committee resolved that he should receive his discharge on the payment of certain instalments : the debtor resumed trade, and applied to his bankers, to whom he owed money for which they had not proved, as it was secured by a mortgage, for further advances on the same security, which, on the representation of the trustee that the liquidation was at an end, they agreed to make : the debtor having failed to pay one of the instalments, was adjudicated bankrupt, the bankers having sold the mortgaged property : *Held* that they were entitled to retain out of the purchase-money the whole amount due on the mortgage and further advance.—*Ex parte Bolland, Re Dysart*, 26 W.R. 807.
- (xxi.) **C. J. B.**—*Money Demand—Jurisdiction.*—The Court of Bankruptcy has no jurisdiction under section 72 of the Bankruptcy Act, 1869, to enforce a more money demand by the trustee against a third party.—*Ex parte Musgrave, Re Wood*, 26 W.R. 915.
- (xxii.) **C. A.**—*Mortgage—Delivery of Possession—Jurisdiction.*—Where a mortgagee, having rights outside the bankruptcy, comes to the Court of Bankruptcy and submits his rights to be determined there, the Court has jurisdiction to order the trustee in bankruptcy to deliver up possession to him.—*Ex parte Fletcher, Re Hart*, 26 W.R. 843.
- (xxiii.) **C. J. B.**—*Order and Disposition—Bill of Exchange—Appropriation.*—C. endorsed bills of exchange drawn by A. on B. on the security of cement in A.'s warehouses. A. kept the cement in barrels marked with B.'s initials to whom he sent the invoice. A. having filed a liquidation petition, C. paid off the bills of exchange, and claimed the cement as held by A. as his trustee : *Held* that it passed to A.'s trustee in bankruptcy.—*Ex parte Cohen, Re Cohn*, 38 L.T. 884.
- (xxiv.) **C. A.**—*Order and Disposition—Policy—Thing in Action.*—A policy of life assurance is a "thing in action" within section 15, sub-sec. 5, of Bankruptcy Act, 1869.—*Ex parte Ibbetson, Re Moore*, L.R. 8 Ch. D. 519 ; 39 L.T. 1 ; 26 W.R. 843.
- (xxv.) **C. J. B.**—*Order and Disposition—Three Years' Hire System.*—The custom of letting a piano on hire under an agreement by which on payment of monthly instalments for three years the hirer becomes the owner, is a well-established and good custom, and will prevail to take the piano out of the order and disposition of the hirer on bankruptcy.—*Ex parte Hattersley, Re Blanchard*, L.R. 8 Ch. D. 601.



- (xxvi.) **C. A.**—*Petitioning Creditor's Debt—Beneficial Owner.*—The legal owner of a debt who is a mere trustee, cannot sustain a petition for adjudication against the debtor unless the beneficial owner join in the petition.—*Ex parte Culley, Re Adams*, 38 L.T. 858.
- (xxvii.) **C. A.**—*Proof—Bill of Exchange—Bankruptcy of Acceptor—Jurisdiction*—A consignee of goods for sale on commission accepted bills drawn by consignor for value of goods: consignor filed a liquidation petition, and consignee sold the goods and paid the money to his own account: he afterwards suspended payment, and his creditors accepted a composition of seven shillings in the pound: *Held* that the demand of the trustee for the balance of the proceeds of the sale, in order to pay the sums remaining on the bills, was a mere demand for a debt due to the consignor's estate, and that the Court of Bankruptcy ought not to try it.—*Ex parte Dickin, Re Pollard*, 38 L.T. 860.
- (xxviii.) **C. A.**—*Proof—Partnership—Fraud—Joint and Several Estates.*—Where a partnership debt has been incurred by means of fraud, the creditor has the right to prove at his election against either the joint or separate estates, and he does not lose the right merely by proving and receiving a dividend.—*Ex parte Adamson, Re Collie*, L.R. 8 Ch. D. 807; 38 L.T. 917; 26 W.R. 890.
- (xxix.) **C. A.**—*Proof—Voluntary Covenant—Bankruptcy Act, 1869, s. 32.*—Section 32 of the Bankruptcy Act has abolished the rule of administration in bankruptcy formerly followed, that the payment of a voluntary bond must be postponed to debts for valuable consideration.—*Ex parte Pottinger, Re Stewart*, L.R. 8 Ch. D. 621; 47 L.J. Bcy. 43.
- (xxx.) **P. C.**—*Trustee under Creditors' Deed—Calls on Shares.*—Appellant held shares in a company as nominee of a firm in which he was partner: the company was wound up and appellant became liable for calls on the shares: the firm became insolvent and assigned their assets to trustees for the benefit of creditors: *Held* that appellant could not require the trustees to indemnify him for the calls on the shares.—*Levi v. Ayers*, L.R. 3 App. 842.
- (xxxi.) **P. C.**—*Vendor's Lien.*—Under an arrangement with the purchasers, the vendors of goods retained possession of them, the purchasers paying them warehouse rent: *Held* that the vendor's lien for unpaid purchase-money revived on the insolvency of the purchasers.—*Grice v. Richardson*, 47 L.J. P.O. 48.

#### Bill of Exchange :—

- (i.) **C. A.**—*Acceptance by Partner—Bill Drawn in Blank.*—A partner has no implied authority to bind his firm by issuing bills purporting to be accepted by the firm, but with the drawer's name in blank.—*Hogarth v. Latham*, 39 L.T. 75.
- (ii.) **C. A.**—*Blank Acceptance—Lost Bill—Filling up without Authority.*—Defendant having given H. his blank acceptance on stamped paper, it was afterwards returned to him by H., and he left it in his chambers, from whence it was lost or stolen: C. afterwards filled in his own name, without defendant's authority: *Held* that defendant was not liable on the bill to an indorsee for value.—*Basendale v. Bennett*, L.R. 3 Q.B.D. 525; 47 L.J. Q.B. 624; 26 W.R. 899.
- (iii.) **C. A.**—*Cancellation.*—Defendant advanced to plaintiff £15,000 on the security of bills of exchange accepted by S. and goods: on a bill being dishonoured, plaintiff, to prevent a sale of the goods, gave defendant a cheque as collateral security, to be returned when the bills were paid in full: subsequently plaintiff consented to a sale, in order to effect which defendant agreed with S., without plaintiff's knowledge, to cancel the bills: *Held* that plaintiff could not recover the cheque till the £15,000 was paid in full.—*Yglesias v. River Plate Bank*, L.R. 3 C.P.D. 330.

- (iv.) **C. A.**—*Notice of Dishonour—Indorsement Abroad.*—A bill drawn in England and payable in Spain was indorsed by defendant to plaintiff, and by him to M., who resided in Spain: acceptance was refused, of which M. did not inform plaintiff till after twelve days, and thereupon plaintiff gave notice to defendant: no notice of dishonour is required by the law of Spain: *Held* that plaintiff was entitled to recover on the bill.—*Horne v. Rouquette*, L.R. 3 Q.B.D. 514; 26 W.R. 894.

**Bill of Sale:—**

- (i.) **Q. B. Div.**—*After-acquired Property.*—A bill of sale assigned to the plaintiff all the machinery and plant on certain premises, and specified in the schedule thereto, subject to additions, alterations, and renewals of parts of the machinery which had taken place since a certain date, or which should thereafter be upon the same premises: *Held* that machinery brought upon the premises subsequently to the execution of the bill of sale was included in it.—*Leatham v. Amor*, 47 L.J. Q.B. 581.
- (ii.) **C. A.**—*Hired Goods—Payment by Instalments.*—R. agreed with C. for the purchase of furniture from him on the hire system, by which the furniture was to become R.'s property on payment of thirteen monthly instalments: the agreement authorised C. to seize the furniture on failure to pay any of the instalments, and promissory notes were given by R. for the amount, such notes to become void in case of seizure by C.: R. filed a liquidation petition, and C. seized the furniture: *Held* that the agreement did not constitute a bill of sale.—*Ex parte Crawcour, Re Robertson*, 39 L.T. 2.
- (iii.) **Q. B. Div.**—*Registration—Description of Witness.*—The attestation to a bill of sale described the witness correctly as solicitor, B. Street, City of London: in the affidavit he described himself in the same way, and stated that he resided at G. House, Acton, in the City of London, in mistake for Middlesex: *Held* a sufficient description of his residence.—*Blount v. Harris*, 47 L.J. Q.B. 596.
- (iv.) **Q. B. Div.**—*Registration—Proof.*—The claimant, under a bill of sale, in order to prove due filing of it, produced the bill and a certificate stamped with the seal of the Q.B. Div. Judgment Office, of the registration in that office of a document purporting to be a copy of bill of sale, and an affidavit: *Held* no sufficient evidence of due filing.—*Emmott v. Marchant*, L.R. 3 Q.B.D. 555.

**Canada, Law of:—**

- (i.) **P. C.**—*Direct Taxation—Stamp Act—30 & 31 Vict., c. 3, s. 92.*—A stamp Act is not direct taxation within section 92 of British North America Act.—*Attorney-General of Quebec v. Queen Insurance Co.*, 38 L.T. 897.
- (ii.) **P. C.**—*Seignorial Rights—Commutation Fine—Purchase by Crown.*—By the Consolidated Statutes of Lower Canada, c. 41, s. 74, it was provided that a commutation fine should be payable to the seignors of a certain fief on the first motation that would have given a legal right to a seignorial due within twenty years from the passing of the Act: the fief was purchased by the Government, who paid the seignor an indemnity of one-fifth of the value: on a subsequent conveyance from the Crown: *Held* that the right of the seignor to the commutation fee was extinguished by the receipt of the indemnity.—*Sisters of St. Joseph of Montreal v. Middlemiss*, 38 L.T. 899.

**Charity:—**

- (i.) **C. A.**—*Lease—Statute of Limitations—13 Eliz., c. 10.*—A voluntary charitable society, founded in 1758 for establishing a hospital, and subsequently incorporated by Act, is within 13 Eliz., c. 10: a lease

of premises was granted by such society for more than 21 years: *Held* that the possession of the defendants, though not the original lessees, must be referred to the lease in the absence of evidence, that the lease was voidable and not void, but that the Statute of Limitations began to run against the Corporation from the time of granting the lease.—*Magdalen Hospital v. Knotts*, L.R. 8 Ch. D. 709; 47 L.J. Ch. 726.

- (ii.) **Ch. Div. M. R.**—*Payment into Court under Trustee Relief Act*—16 & 17 Vict., c. 137, s. 17—Trustees of a charity may pay the trusts funds into Court under the Trustee Relief Act, but they ought not to present a petition for administration of the trusts without the Charity Commissioners' authority.—*Re Poplar and Blackwall School*, L.R. 8 Ch. D. 543; 39 L.T. 88; 26 W.R. 827.
- (iii.) **P. C.**—*Scheme—School—Endowed Schools Act, 1869.*—A direction in an endowment deed that certain persons may continue at the school founded after the age of manhood, does not make the endowment less an educational endowment within the Endowed Schools Act, 1869: section 19 of the Act does not prevent the Commissioners from making the office of rector of a parish a qualification for a place in the governing body of a Church of England school: the Commissioners may, in a scheme, reserve to themselves a species of visitorial jurisdiction.—*Re Hodgson's School*, L.R. 3 App. 857; 38 L.T. 790.
- (iv.) **P. C.**—*Scheme—Schools—Endowed Schools Act, 1869.*—A petition having been presented against a scheme for an endowed school by inhabitants and ratepayers as members of a class having a right, by the founder's deed, to free education for their children: *Held* that in the absence of special circumstances they had no *locus standi* as petitioners.—*Re Shaftoe's Charity*, L.R. 3 App. 872; 38 L.T. 793.
- (v.) **Ch. Div. V. C. B.**—*Scheme—Gift to School—Transfer to School Board.*—The scheme for the regulation of an elementary undenominational school for boys, provided that the trustees of an annuity should pay it to the treasurer for the benefit of the school or any other school established in its stead, but if any such school should not be substantially like the school first mentioned, or should become materially altered, the trustees might apply the annuity otherwise: the school was transferred to the School Board, who made it a school for boys and girls, and proposed to apply the annuity towards prizes and scholarships for the scholars: *Held* that the School Board was entitled to the annuity.—*London School Board v. Faulconer*, L.R. 8 Ch. D. 571.
- (vi.) **Ch. Div. M. R.**—*Will—Charitable Gift—"Poorest Kindred."*—Gift of income of property for the benefit of the poorest of testator's kindred, such as were not able to work for their living, &c., and declaration that in distributing the estate "to the poor charitable uses," those of testator's kindred who were poor or impotent were chiefly to be preferred: *Held* a gift to charitable objects, such objects being necessitous persons, with a prior charge in favour of such of the kindred as were necessitous.—*Attorney-General v. Duke of Northumberland*, 47 L.J. Ch. 569.

#### Common:—

- (i.) **Ex. Div.**—*Right to Cut Furze—Royal Grant—Uncertainty.*—Inhabitants of F. claimed a right as such to cut furze on F. common, basing their claim on a lost royal grant: *Held* that the grant in order to have been good must have incorporated the inhabitants for that purpose, and this would not be presumed in the absence of express evidence.—*Lord Rivers v. Adams*, 39 L.T. 39.

#### Company:—

- (i.) **C. P. Div.**—*Cost-book Mining Company—Action for Calls.*—A creditor of a cost-book mining company will not be allowed to bring an action

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against a shareholder for the purpose of enforcing a call.—*Escott v. Ch*  
47 L.J. C.P. 606.

- (ii.) **C. A.—Director—Agent—Fraud—Liability.**—Directors of a comp being authorised to raise money by debentures, employed brokers place the debentures, and the brokers issued a prospectus bearing directors' names, containing statements which the brokers knew to false, and which induced the plaintiff to take shares. B., one of directors, gave no express authority to the brokers to make the statements, he did not know that they were false and received no benefit fr the sale of the debentures: *Held* that B. was not liable to the plaintiff *Weir v. Bell*, L.R. 8 Ex. D. 238; 38 L.T. 929.
- (iii.) **Q. B. Div.—Directors—Election—Mandamus.**—Articles of a comp provided that all questions at meetings should be decided by show hands unless immediately thereon a poll should be demanded by sh holders qualified to vote and holding together at least 2,000 shares: h that the shareholders demanding a poll must themselves hold 2, shares, and not merely by proxy: mandamus granted to admit a direc duly elected to office, when the place had been assumed and occupied another person not duly elected.—*Regina v. Government Stock Investm Co.*, L.R. 3 Q.B.D. 412.
- (iv.) **C. A.—Directors—Ultra Vires—Severable Agreement.**—Articles Association provided that shares should not be issued below par: agreed to purchase 2,000 shares at par, and on the same day, directors agreed to pay him £4,000 for his services: *Held* that agreements were severable, and that M. could not set up that the sec was ultra vires to resist specific performance of the first.—*Odessa Tr ways Co. v. Mendel*, 26 W.R. 887.
- (v.) **C. A.—Director's Qualification—Resignation—Liability—Scire Facias** A company's special Act provided that T. and A. should be direct until first ordinary meeting, and that qualification of a director sho be the holding of 50 shares: T. and A. sent in their resignations withi year afterwards, and other persons were appointed in their st informally: no shares were ever allotted to T. and A., and by an infor register it appeared that all the shares of the company were allotted persons other than T. and A.: subsequently the company beca indebted to a bank which obtained judgment and issued executi *Held* that T. and A. were not liable on writs of *scire facias* to the b as holders of qualification shares.—*Kipling v. Todd*, L.R. 3 C.P.D. 3 47 L.J. C.P. 617.
- (vi.) **Ch. Div. F. J.—Misrepresentation—Liability—Rescission—Pleading** In an action by a shareholder against a company for repayment: indemnity as to his shares, on the ground of misrepresentation made certain of the directors: *Held* that those persons only who made representations were responsible for them, and that the company: only liable as far as the representations were made in the ordinary cou of its business: no claim for rescission being raised on the pleadin leave to amend was refused on the ground that plaintiff had appea in support of a winding-up petition as a contributory.—*Cargill v. Bos* 47 L.J. Ch. 649.
- (vii.) **Ch. Div. V. C. H.—Winding-up—Action for Indemnity—Summon Defendant as Witness—Companies Act, 1862, ss. 116, 117.**—A. assign his right to indemnity against B. in respect of shares in a company liquidation to the company; the liquidator having brought an act against B. in A.'s name, the Court summoned B. to give evidence matters the subject of the action.—*Massey v. Allen*, 47 L.J. Ch. 7 26 W.R. 908.

- (viii.) **C. A.—Winding-up—Contributory—Director—Allotment.**—A director who never applied for shares attended a meeting at which a previous allotment of shares, including shares allotted to him which he did not know of, was confirmed, and his name was found on the register when the Company was ordered to be wound up: *Held* that he was entitled to have his name struck off the list of contributories.—*Re Wincham Shipbuilding Co., Hallmark's Case*, 26 W.R. 824.
- (ix.) **C. A.—Winding-up—Contributory—Director—Fraudulent Reference.**—Directors of a company were liable to a bank on their personal guarantee for the over-drafts of the company, and were holders of shares on which nothing had been paid: the bank, having recovered judgment against them in respect of their guarantee, they paid the amounts due on their shares into the bank in reduction of the balance due from the company: *Held* that the payment was made *bonâ fide*, and must be allowed in the winding-up.—*Re Wincham Shipbuilding Co., Poole, Jackson, and White's Case*, 26 W.R. 823.
- (x.) **C. A.—Winding-up—Contributory—Past Members—Power to Compromise.**—A life assurance company's deed contained powers to alter the objects and business of the company, and it was resolved to undertake fire insurance and guarantee business, and new shares called B. shares were issued appropriated to the new business: being afterwards advised that the new business was *ultra vires*, the B. shares were cancelled and a new company founded, to which the assets of the old company were transferred: *Held* on the winding-up of the old company that the B. shareholders were liable to contribute as past members.—*Bath's Case, Re Norwich Provident Insurance Society*, 47 L.J. Ch. 601.
- (xi.) **C. A.—Winding-up—Contributory—Purchase of Shares by Company—Ultra Vires.**—The deed of the N. Insurance Company, whose capital was in £10 shares, provided that every instrument whereby the company became liable to pay money, should contain a clause limiting the liability of the shareholders to the amounts payable on their shares, and that the company might at a general meeting purchase the business of any other company of a like nature: the N. company resolved to purchase the business of the C. company, whose capital was in £50 shares and £5 paid up, and whose deed contained no power to sell: the C. company's shares were bought by the N. company and transferred to its officers, and by a deed not sanctioned at a general meeting, the shares were transferred to the N. company, which was entered in the C. company's register: *Held* that the transfer was *ultra vires*, and that the N. company could not be put on the list of contributories of the C. company.—*Ex parte British Nation Association, Re European Society Arbitration*, L.R. 8 Ch. D. 679.
- (xii.) **H. L.—Winding-up—Contributory—Registration of Contract—Estoppel.**—Where a company issues certificates of shares as fully paid-up, it is estopped as against a transferee without notice, from alleging that they have not been paid for in cash, and so is the official liquidator.—*Burkinshaw v. Nicholls*, 26 W.R. 819.
- (xiii.) **C. A.—Winding-up—Contributory—Registration of Contract.**—Newspaper proprietors agreed to take 100 fully paid-up shares to be paid for by future advertisements of the prospectus of a company, and in return sent a receipt for their advertising account: the transaction was not registered: *Held* that they must be put on the list of contributories for 100 shares.—*Andress's Case, Re Church and Empire Insurance Co.*, 47 L.J. Ch. 679.
- (xiv.) **C. A.—Winding-up—Contributory—Registration of Contract.**—A. sold property to a company, which was paid for partly in shares issued as fully paid-up, but the contract was not registered. He afterwards

transferred some of the shares to B. for valuable consideration, B. having notice of the circumstances under which the shares were issued: *Held*, on the winding-up, that B. must contribute in respect of these shares.—*Re British Farmers' Co., Potter and Brown's Case*, 26 W.R. 839.

- (xv.) **C. A.**—*Winding-up—Contributory—Registration of Contract.*—30 & 31 Vict., c. 131, s. 25.—A company, having agreed to purchase property partly for paid-up shares, a contract was sent to be registered, but owing to a mistake the registration was delayed, and the allotment of shares took place before registration: no certificates of the shares were issued, or registration of the shareholders made, till after the registration of the contract: the allottee, however, executed transfers of some of the shares: *Held*, on the winding-up of the company, that the shares were paid up, and the allottee could not be made a contributory.—*Clarke's Case, Re Ambrose Lake Mining Co.*, L.R. 8 Ch. D. 635; 47 L.J. Ch. 696.
- (xvi.) **C. A.**—*Winding-up—Payment of Debts—Income Tax—Priority.*—In the winding-up of a company under the Companies Act, 1862, the Crown has a right to payment of all arrears of income-tax in priority to other debts.—*Re Henley & Co.*, 39 L.T. 53; 26 W.R. 885.
- (xvii.) **Ch. Div. M. R.**—*Winding-up—Payment of Debts—Secured Creditors—Judicature Act, 1875, s. 10.*—Execution creditors issued a *fi. fa.* against a company, under which the sheriff seized: but a petition was presented three days after for winding-up the company, and on receiving notice of the winding-up order, the sheriff withdrew from possession: *Held*, that the execution creditors were entitled to no priority in the payment of their debt.—*Re Printing and Numerical Registration Company*, L.R. 8 Ch. D. 535; 47 L.J. Ch. 580.
- (xviii.) **Ch. Div. V. C. B.**—*Winding-up—Petition—Companies Act, 1867, s. 40.*—A petition for winding-up may be presented by persons who have obtained a decree ordering the company to allot them shares, though they have not been registered as shareholders at the time of presentation.—*Re Patent Steam Engine Co.*, 26 W.R. 811.
- (xix.) **C. A.**—*Winding-up—Rent—Distress—Companies Act, 1862, s. 163.*—A distress for rent accrued due before commencement of winding-up and levied afterwards by a person who cannot prove in the winding-up, is good.—*Re Regent United Service Stores*, L.R. 8 Ch. D. 616, 47 L.J. Ch. 677.
- (xx.) **C. A.**—*Winding-up Voluntarily—Return of Registrar—Jurisdiction.*—After the completion of a voluntary winding-up, and the expiration of three months from registration of the return made by the Registrars of Joint Stock Companies of the holding of the final meeting, the Court has no jurisdiction, in the absence of fraud, to make a winding-up order.—*Re Pinto Silver Mining Co.*, 47 L.J. Ch. 591.
- (xxi.) **Ch. Div. V. C. B.**—*Winding-up Voluntarily—Return of Registrar—Jurisdiction.*—Same decision as (xx).—*Re Westbourne Grove Drapery Co.*, 39 L.T. 30.

**Copyright:—**

- (i.) **H. L.**—*Dramatic Copyright—Infringement—Facts left to Judge*—3 & 4 Will. 4, c. 15, s. 2.—To support an action for infringement of dramatic copyright, the taking some substantial part of plaintiff's production by defendant, must be proved. Where by agreement the case was withdrawn from the jury and left to the judge: *Held* that on motion for new trial or to enter verdict for plaintiffs, the judge might explain to the Court the reasons and meaning of his finding.—*Chatterton v. Cave*, 47 L.J. C.P. 545.



**County Court :—**

- (i.) **Ex. Div.—Arbitration—Appeal—**9 & 10 Vict., c. 95, s. 77; 13 & 14 Vict., c. 61, s. 14.—The decision of a County Court Judge refusing to set aside an award under the County Court Act, 1846, s. 77, is final.—*Mayer v. Farmer*, L.R. 3 Ex. D. 235.

**Crimes and Offences :—**

- (i.) **Q. B. Div.—Adulteration—Notice to Purchaser—**38 & 39 Vict., c. 63, s. 6.—Where the seller of an article brings to the purchaser's knowledge the fact that the article sold is not of the nature of the article demanded, the sale is not to the prejudice of the purchaser within the meaning of section 6 of Sale of Food and Drugs Act, 1875.—*Sandys v. Small*, L.R. 3 Q.B.D. 449; 26 W.R. 814.
- (ii.) **C. A.—Obscene Book—Indictment.**—In an indictment for publishing an obscene book, the words alleged to be obscene must be set out, and if not, the defect will not be cured by a verdict of guilty.—*Bradlaugh v. The Queen*, L.R. 3 Q.B.D. 607.
- (iii.) **Q. B. Div.—Obscene Book—Order for Destruction—**2 & 3 Vict., c. 71, s. 49; 20 & 21 Vict., c. 83, s. 1.—The omission of the magistrate, making an order for the destruction of obscene books, to state that he was satisfied that such books were of such a character and description that the publication of them would be a misdemeanour and proper to be prosecuted as such is a substantial objection to the order, and such order may be brought up on *certiorari* notwithstanding, 2 & 3 Vict., c. 71, s. 49.—*Ex parte Bradlaugh*, L.R. 3 Q.B.D. 509.
- (iv.) **C. P. Div.—Penalty—Common Informer—Corporation.**—By an act regulating the sale of coal, it was provided that penalties for offences thereunder should be recoverable by action of debt by the person or persons who should inform or sue for the same: *Held* that a corporation not expressly empowered, could not bring an action as common informers under the Act.—*Guardians of St. Leonards, Shoreditch v. Franklin*, L.R. 3 C.P.D. 337; 26 W.R. 882.

**Debtor and Creditor :—**

- (i.) **C. P. Div.—Acknowledgement of Debt—Statute of Limitations—**9 Geo. 4, c. 14, s. 1.—Defendant, in answer to a demand for a debt incurred in 1865, wrote, in 1874, "I never lose sight of my obligations towards you, and shall be glad, as soon as my position becomes somewhat better, to begin again with my instalments:" *Held* that at the most this only amounted to a conditional promise.—*Meyerhoff v. Froehlich*, L.R. 3 C.P.D. 333.
- (ii.) **Q. B. Div.—Attachment of Debt—Existing Debt.**—A. gave B. a cheque in respect of a debt due: C. subsequently obtained an order attaching this debt in respect of a judgment debt due from B., and served the order on A., who stopped payment of the cheque before it was presented: *Held* that there was an existing debt at the time of making the order which could be attached.—*Cohen v. Hale*, 47 L.J. Q.B. 496; 39 L.T. 35.
- (iii.) **C. A.—Creditor's Deed—No Communication.**—Where a debtor conveys property by a voluntary deed to one of his creditors on trust to pay his debts, a creditor, not a party to the deed, and who does not allege that the deed was communicated to him, cannot maintain an action for the administration of the trusts thereof.—*Johns v. James*, L.R. 8 Ch.D. 744; 39 L.T. 54; 26 W.R. 821.
- (iv.) **Ch. Div. V. C. M.—Creditors' Deed—No Communication—Revocation.**—By a trust deed executed by a debtor, certain monies assured on certain policies on his life were directed to be held by trustees who were creditors as security for the payment to creditors, parties to the deed, of

the debts mentioned. S., one of the creditors, never executed the deed, nor was it communicated to him: *Held* that after debtor's death his executors could revoke the trusts as against S.—*Re Sanders' Trusts*, 47 L.J. Ch. 667.

- (v.) **C. A.**—*Equitable Assignment—Building Contract*.—G. contracted with defendant to build a ship, to be paid for by instalments: before completion, G. gave plaintiff an order on defendant to pay plaintiff £100 out of moneys to become due under the contract, of which order defendant had notice: subsequently defendant made advances to G. to an amount greater than that due under the contract, to enable G. to complete the contract: *Held* that the order was a good equitable assignment of the money when it became due, and defendant could not set off the advances to G. against plaintiff's claim.—*Brice v. Bannister*, L.R. 3 Q.B.D. 569.
- (vi.) **C. A.**—*Illegal Consideration—Gaming Debt*—5 & 6 Will. 4, c. 41, s. 1.—Money lent to a man to pay a bet already lost is not money knowingly lent or advanced for gaming within sec 1 of 5 & 6 Will. 4., c. 41.—*Ex parte Pyke, Re Lister*, L.R. 8 Ch. D. 754; 38 L.T. 923; 26 W.R. 806.
- (vii.) **C. A.**—*Sequestration—Judge's Pension*—15 & 16 Vict., c. 54, s. 15—32 & 33 Vict., c. 62, s. 5—Ord. 47.—Order 47 enables a writ of sequestration to be issued against the estate of judgment debtor who has disobeyed an order under section 5 of Debtor's Act, 1869, for payment of a debt by instalments. The pension of a County Court judge may be attached by such an order.—*Willcock v. Terrell*, 39 L.T. 84.

#### Defamation:—

- (i.) **C. P. Div.**—*Libel—Injunction to Restrain Publication*.—The Court has power to restrain by injunction the future publication of matter injurious to the plaintiff's trade which a jury has found to be libellous.—*Saxby v. Easterbrook*, L.R. 3 C.P.D. 339.
- (ii.) **C. P. Div.**—*Libel—Privilege—Fair Report*.—A fair report in a newspaper of *ex parte* proceedings before a magistrate for a summons under the Masters and Servants Act, 1867, is privileged, although the magistrate decide that he has no jurisdiction.—*Usill v. Hales*, L.R. 3 C.P.D. 319.

#### Domicil:—

- (i.) **C. A.**—*Abandonment—Animus Revutendi*.—The expressions of a foreigner engaged in trade in England of an intention to return to his native country when he has made his fortune, are not sufficient to prevail against the evidence of intention to be gathered from his conduct, if otherwise this would be sufficient to constitute an abandonment of domicil.—*Doucet v. Geoghegan*, 26 W.R. 825.

#### Easement:—

- (i.) **Ch. Div. V. C. H.**—*Light and Air—Agreement—Notice*.—An agreement between adjacent owners provided for the enjoyment of a certain window without obstruction: a purchaser for value of the servient tenement without notice, but knowing of the window, *held*, bound by the covenant.—*Allen v. Seckham*, 47 L.J. Ch. 742.
- (ii.) **Ch. Div. M. R.**—*Right of Way*.—Defendant agreed to grant a lease of a piece of ground to plaintiff for purpose of erecting a workshop thereon: there was only one access to the land, by means of a paved roadway through a yard belonging to defendant, and in the agreement it was stipulated that plaintiff should not obstruct the gateway of the yard except for purposes of ingress and egress: *Held* that plaintiff had an unrestricted right of way through the gateway and over the yard.—*Cannon v. Villars*, 47 L.J. Ch. 597; 38 L.T. 939.



- (iii.) **C. A.**—*Right of Way—Inclosure*—8 & 9 Vict., c. 118, ss. 16-68.—H. sold land to defendant, reserving any allotments to be made in respect thereof of waste lands about to be inclosed, and he afterwards sold the inclosed allotments to plaintiff: before the inclosure a trackway existed over this land, which had been used by the occupiers of defendant's land for more than 40 years: the award did not set out this trackway: *Held* that it was extinguished.—*Crush v. Turner*, L.R. 3 Ex. D. 803; 47 L.J. Ex. 636; 26 W.R. 900.
- (iv.) **Ch. Div. F. J.**—*Right of Way—Statutory Powers*—24 & 25 Vict., c. 45, s. 11.—Under the authority of a general order made under 24 & 25 Vict., c. 45, and confirmed by a special Act, plaintiffs erected a pier so as to obstruct an alleged public right of way: *Held* that as the statutory powers authorised the erection of a pier so as to render the existence of the right of way inconsistent with that of the pier, the right of way must be deemed to have been taken away by the powers.—*Corporation of Yarmouth v. Simmons*, 38 L.T. 881; 26 W.R. 802.

#### **Ecclesiastical Law:—**

- (i.) **C. A.**—*Mortgage of Pew Rents*—13 Eliz., c. 20.—A mortgage of pew rents of a consolidated chapel, paid to the churchwardens on trust to pay the expenses of the chapel and hand over the surplus to the vicar, is void under 13 Eliz., c. 20.—*Ex parte Arrowsmith, Re Levison*, 47 L.J. Bcy. 46.

#### **Evidence:—**

- (i.) **Q. B. Div.**—*Admissibility—Order to Pay—Assignment—Stamp*—33 & 34 Vict., c. 97.—T., who was building a steam launch for J., and was indebted to R., wrote to J.—“I hereby assign to R. the sum of £40 or any other sum now or hereafter to become due in respect of the steam launch, to hold same at R.'s disposal, R.'s receipt to be a sufficient discharge:” *Held* not an order to pay, but an assignment, and admissible in evidence on payment of duty and penalty.—*Buck v. Robson*, 26 W.R. 804.
- (ii.) **P. D. A. Div.**—*Admissibility—Ship's Log*.—Entries made in a ship's log by the mate, and signed by him and the captain two days after collision, cannot be used on behalf of the ship after the death of both mate and captain.—*The Henry Coxon*, 38 L.T. 819.
- (iii.) **C. A.**—*Lease—Counterpart—Presumption*.—In an action for possession of land, plaintiff alleged that defendant occupied under a lease the counterpart of which was produced by plaintiff: *Held* that this was evidence of the execution of the lease, and, in the absence of other evidence, it would be presumed that defendants occupied under the lease.—*Magdalen Hospital v. Knotts*, L.R. 8 Ch. D. 709.

#### **Fishery:—**

- (i.) **H. L.**—*Salmon Fishings—Erection on Foreshore*.—*Held* that the raising of the embankment on the foreshore of a river by an inferior heritor in order to prevent overflow did not constitute an illegal obstruction within the Salmon Fishery Acts, though it might to some extent delay salmon in ascending the river.—*Duke of Sutherland v. Ross*, L.R. 3 App. 736.
- (ii.) **H. L.**—*Several Fishery—Evidence—Question for Jury*.—A claim of several fishery was founded on a grant from the Crown in 1660: *Held* under the circumstances that the case ought to have been left to the jury as a question of fact.—*Bristow v. Cormican*, L.R. 3 App. 641.

#### **Highway:—**

- (i.) **Ex. Div.**—*Obstruction—Frightening Horse—Injury to Driver*.—Defendant left a van by the side of a highway, four or five feet from the metalled way, and as H. was driving past, his horse, which was a kicker,

though H. did not know it, shied and kicked, so that H. fell out, was kicked, and died in consequence: the jury found that the van was left there unreasonably and negligently, and that H.'s death was caused by the van standing there and the vice of the horse combined: *Held* that H.'s executors were entitled to a verdict under Lord Campbell's Act.—*Harris v. Mobbs*, L.R. 3 Ex. D. 268.

- (ii.) **Q. B. Div.**—*Repair—Turnpike Trust*—11 & 12 Vict., c. 63, s. 144; 21 & 22 Vict., c. 98, s. 41.—Section 41 of the Local Government Act, 1858, does not empower a local board to take upon themselves the repair or alteration of a longitudinal section of a turnpike road: no damages done by a local board in repairing a turnpike road under that section can be the subject of arbitration under the Public Health Act, 1848.—*Nutter v. Accrington Local Board*, 47 L.J. Q.B. 521.

### Husband and Wife:—

- (i.) **C. A.**—*Divorce—Costs of Suit*.—Where a suit has been properly instituted by a wife for a divorce on the ground of adultery and cruelty, the husband is liable to her solicitor for fair and reasonable costs as between solicitor and client, incurred in the suit, though such costs have been disallowed on the party and party taxation.—*Ottaway v. Hamilton*, 38 L.T. 925; 26 W.R. 783.
- (ii.) **P. D. A. Div.**—*Divorce—Collusion*.—If by agreement between the parties to a divorce suit, material facts which might have been adduced in support of a counter-charge against the petitioner are withheld from the Court, although such facts might not have established the counter-charge, such agreement will amount to collusion.—*Hunt v. Hunt*, 39 L.T. 45.
- (iii.) **P. D. A. Div.**—*Divorce—Maintenance*—20 & 21 Vict., c. 85, s. 32.—The Court has power to make an order for the maintenance of a wife after decree absolute has been pronounced.—*Bradley v. Bradley*, L.R. 3 P.D. 47; 47 L.J. P.D.A. 53; 26 W.R. 831.
- (iv.) **P. D. A. Div.**—*Divorce—Foreign Subject*—20 & 21 Vict., c. 85, s. 27.—The Court has no jurisdiction to entertain a petition for dissolution of marriage on the ground of adultery and desertion in England against a foreign subject resident in England as a consular officer of his own country: and his having formerly presented a petition for dissolution in the same Court, which was abandoned, does not constitute a submission to the jurisdiction.—*Niboyet v. Niboyet*, L.R. 3 P.D. 52; 47 L.J. P.D.A. 49.
- (v.) **P. D. A. Div.**—*Divorce—Settlement—Variation*.—The fact that proceedings are pending in the Chancery Div. for administering the trusts of a settlement is no answer to a petition for variation of its provisions; nor will a delay of five years after divorce disentitle the petitioner to relief: the Court ordered the income of settled property to be paid to the wife and children, although in the settlement an absolute discretionary power was given to the trustees to dispose of the income for benefit of husband, wife, and children, in the event of the husband's bankruptcy, which had taken place.—*Marsh v. Marsh* 47 L.J. P.D.A. 34; 39 L.T. 107.
- (vi.) **P. D. A. Div.**—*Divorce—Settlement—Variation—Decree Nisi—Injunction*.—A husband having obtained a *decree nisi* for divorce, gave instructions to his solicitor to file a petition for the variation of an alleged post-nuptial settlement, under which the respondent had possessed herself of £3,000 with which she bought a house: it appearing that she was about to dispose of the house, the Court granted an injunction restraining her from doing so.—*Noakes v. Noakes*, 39 L.T. 47.
- (vii.) **Ch. Div. V. C. M.**—*Equity to Settlement—Life Interest*.—The Court

has power to give the wife an equity to a settlement of the whole of a life interest as against the assignee in insolvency of the husband.—*Taunton v. Morris*, 47 L.J. Ch. 721.

- (viii.) **P. D. A. Div.**—*Judicial Separation—Custody of Children*—Judicial separation having been decreed on wife's petition, husband and wife were both at time of marriage Roman Catholics, but husband had since become Protestant, and children had been placed at a Protestant school. The Court committed the custody of the children to the mistress of the school with leave for both parents to have full access to them.—*D'Alton v. D'Alton*, 47 L.J. P.D.A. 59.
- (ix.) **P. D. A. Div.**—*Nullity of Marriage—Non-Consummation*.—Wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in declaring a marriage null by reason of impotence.—*S. v. A.*, L.R. 3 P.D. 72.
- (x.) **P. D. A. Div.**—*Nullity of Marriage—Residence in Scotland for 21 days*—19 & 20 Vict., c. 96, s. 1.—Two persons domiciled in England left London on the 30th June and arrived in Edinburgh the next morning, where they were married on the 21st July, having been in Scotland during the interval: on evidence being given that the Scotch law required a residence of 21 whole days in the country to render a marriage valid, decree of nullity of marriage was pronounced.—*Lawford v. Davies*, 47 L.J. P.D.A. 38; 39 L.T. 111.
- (xi.) **P. D. A. Div.**—*Restitution—Compromise*.—A wife who agrees to stay proceedings in a suit for restitution of conjugal rights on certain terms, will be bound by the agreement.—*Stanes v. Stanes*, L.R. 3 P.D. 42; 39 L.T. 46.
- (xii.) **P. D. A. Div.**—*Restitution—Foreign Domicil—Service*—20 & 21 Vict., c. 85, s. 42.—The Court has no power to order service out of the jurisdiction of a petition for restitution of conjugal rights, and the wife of a man not domiciled in England cannot maintain a suit for restitution if her husband has left the jurisdiction before the commencement of proceedings.—*Firebrace v. Firebrace*, 47 L.J. P.D.A. 41; 39 L.T. 94.
- (xiii.) **Q. B. Div.**—*Separation Deed—Necessaries*.—A husband and wife had executed a separation deed, whereby the income of property settled on the wife at the marriage, and a small allowance from the husband, was secured for the support of the wife and her children, and the wife covenanted that she would not apply for further assistance: *Held* that the wife could not pledge the husband's credit for necessaries, even though the income secured to her should prove insufficient for her support.—*Eastland v. Burchell*, L.R. 3 Q.B.D. 432; 47 L.J. Q.B. 500.
- (xiv.) **C. A.**—*Wife's Chose in Action—Reduction into Possession*.—A. sold his wife's share in an intestate's estate to B., a solicitor, who conducted a suit for the administration thereof: the executors of A., who predeceased his wife, instituted a suit to set aside the sale on the ground of concealment by B. of the true value of the share: *Held* that the wife's chose in action had been reduced into possession by A., and that the right to avoid the sale survived to his executors.—*Widgery v. Tepper*, 47 L.J. Ch. 550.

#### India, Law of:—

- (i.) **P. C.**—*Powers of Legislature—Indian High Courts Act, 1861—Act XXII. of 1869*.—Act XXII. of 1869 of India is not inconsistent with 24 & 25 Vict., c. 104, or with the Charter of the High Court, and is within the legislative powers of the Governor-General in Council.—*Regina v. Burah*, L.R. 3 App. 889.

**Innkeeper's Lien:—**

- (i.) **C. A.—Guests Goods—Wrongful Conversion.**—B. bought horses and carriages of plaintiff and took them to defendant's inn, where he was entertained for a long time: he never paid for the horses and carriages, and absconded owing defendant his bill, and leaving the horses and carriages with him: subsequently, he re-assigned the horses and carriages to plaintiff; but defendant refused to give them up till B.'s bill was paid, and afterwards sold the horses: *Held* that defendant had a general lien on the horses and carriages for the whole of B.'s bill; but that the sale of the horses was a wrongful conversion, for which the plaintiff could maintain an action, and that the measure of damages was the value of the horses.—*Mulliner v. Florence*, L.R. 3 Q.B.D. 484.

**Insurance:—**

- (i.) **Ch. Div. M. R.—Life Assurance—Assignment—Payment into Court.**—An assurance company is not a trustee but a debtor, and is not justified in paying policy-moneys into Court under the Trustee Relief Act.—*Matthew v. Northern Assurance Company*, 47 L.J. Ch. 562.

**Landlord and Tenant:—**

- (i.) **Ch. Div. F. J.—Agreement for Lease—Statute of Frauds.**—A memorandum of agreement for a lease was signed by both parties but did not state when the lease was to commence: *Held* that the agreement was valid within the Statute of Frauds, and that the term commenced from the date of the memorandum.—*Jaques v. Millar*, 47 L.J. Ch. 544.
- (ii.) **Ch. Div. V. C. M.—Agreement for Lease—Mistake—Quiet Enjoyment.**—A. agreed to take an underlease for whatever term B. held. By mistake the underlease was made for seven years longer than that B. held, and nearly at the end of B.'s term his executors discovered the mistake and told A. that he must give up possession at the end of B.'s term; whereupon A. procured a fresh lease from the landlord at an increased rent: *Held* that A. could not recover damages on that account, and that there had been no breach of the covenant in the underlease for quiet enjoyment.—*Besley v. Besley*, 38 L.T. 844.
- (iii.) **H. L.—Lease—Covenant—Alteration of Property by Lessee.**—A lease of premises described as stores for a term of which 900 years was unexpired, contained a covenant to "preserve, support, maintain, and keep the premises and all improvements in good repair:" *Held* that the reversioner was not entitled to an injunction to restrain the lessee from converting the premises into dwelling-houses, it appearing that the security for the rent would be thereby increased.—*Doherty v. Allman*, L.R. 3 App. 709.
- (iv.) **C. A.—Lease—Covenant—Quiet Enjoyment.**—When, after granting a lease of premises for a special purpose, an Act has been passed which renders it illegal to use the premises for that purpose, the refusal to permit them to be so used is not a breach of covenant for quiet enjoyment, and a covenant to keep the premises in proper repair and condition for the special purpose, relates only to the physical condition, and does not impose on the lessor any obligation to put them in a condition to be used for the special purpose in accordance with the Act.—*Newry v. Sharpe*, 47 L.J. Ch. 617.
- (v.) **C. P. Div.—Lease—Covenant to Pay Rates—Drainage Expenses—38 & 39 Vict., c. 55.**—A covenant to pay rent without deduction except land and property tax, and to pay all rates, taxes, and charges imposed during the term on the premises or in respect thereof: *Held* not to make lessee liable for expenses of drainage incurred by landlord in consequence of, a requisition under the Public Health Act to abate a nuisance.—*Rawlins v. Biggs*, L.R. 3 C.P.D. 368; 47 L.J. C.P. 487.

- (vi.) **Q. B. Div.**—*Lease—Covenant not to use as Beer-shop.*—A lease contained a covenant by the lessee not to allow the premises to be used as a beer-shop: *Held* that the selling beer by retail to be consumed off the premises was a breach of the covenant.—*Bishop of St. Albans v. Battersby*, 47 L.J. Q.B. 571.
- (vii.) **H. L.**—*Lease—Iron Mine—Poor Rate—37 & 38 Vict., c. 54, s. 8.*—The lease of an iron mine, made before the passing of the Rating Act, 1874, contained a covenant by the lessee to pay all manner of taxes, rates, assessments, charges, and impositions then or thereafter during the continuance of the lease to be imposed upon the premises, landlord's property tax excepted: *Held* that the lessee had not specifically contracted to pay the whole of the poor-rate on the mine in the event of the abolition of its exemption within the meaning of 37 & 38 Vict., c. 54, s. 8.—*Chaloner v. Bolckow*, 47 L.J. C.P. 562.
- (viii.) **C. P. Div.**—*Notice to Quit—Quarter Day.*—A six month's notice to determine a yearly tenancy commencing on one of the usual quarter days, means a notice from one such quarter-day to the next but one following.—*Morgan v. Davies*, 39 L.T. 60; 26 W.R. 816.
- (ix.) **C. P. Div.**—*Notice to Quit—Six Months—Yearly Tenancy—38 & 39 Vict., c. 92, s. 51.*—A yearly tenancy which by express agreement of the parties is determinable on six months notice to quit, is not within s. 51 of the Agricultural Holdings Act, 1875.—*Wilkinson v. Calvert*, L.R. 3 C.P.D. 360; 38 L.T. 813; 26 W.R. 829.

#### **Lands Clauses Act:—**

- (i.) **Q. B. Div.**—*Arbitration—38 & 39 Vict., c. 55, s. 179.*—Where lands are taken compulsorily under sections 175-178 of the Public Health Act, 1875, the proceedings for assessing compensation are wholly governed by the Lands Clauses Acts.—*Regina v. Master Smith, Ex parte Rayner*, L.R. 3 Q.B.D. 444; 26 W.R. 812.
- (ii.) **Ch. Div. V. C. M.**—*Investment—Metropolitan Stock—34 & 35 Vict., c. 47, s. 15.*—Purchase-money paid into Court under the Lands Clauses Act ordered to be invested in Metropolitan Consolidated Stock.—*Re Readhead's Trusts*, 39 L.T. 60.
- (iii.) **C. A.**—*Part of House or other Building.*—*Held*, that premises consisting of a house and shop, with a manufactory at the back, adjoining to a cottage, which was used as a store-room, constituted one house within section 92 of the Act, and that a company, having given notice to treat as to the cottage, might be compelled to take the whole premises.—*Richards v. Swansea Improvements Co.*, 38 L.T. 833.

#### **Licensed House:—**

- (i.) **Q. B. Div.**—*Gaming—Game of Skill—35 & 36 Vict., c. 94, s. 37.*—The fact that a game played for money is a game of skill does not prevent the playing constituting gaming within s. 17, s.s. 1 of 35 & 36 Vic., c. 94.—*Bew v. Harston*, L.R. 3 Q.B.D. 454; 26 W.R. 915.
- (ii.) **Q. B. Div.**—*Selling Beer without License—Penalty—Imprisonment—35 & 36 Vict., c. 94.*—The justices cannot order imprisonment in default of payment of a penalty under 35 & 36 Vict., c. 94, s. 51, s.s. 2, unless there has been first an order for a distress.—*Re Brown*, L.R. 3 Q.B.D. 545.

#### **Lord Mayor's Court:—**

- (i.) **C. A.**—*Jurisdiction—Counter Claim—Judicature Act, 1873, s. 90.*—Where an action has been brought in an inferior Court, and a counter-claim is set up which is beyond its jurisdiction, the Court has power to deal with the counter-claim to the extent of the amount of the plaintiff's claim only.—*Davis v. Flagstaff Silver Mining Company*, 47 L.J. C.P. 503.

**Lunacy:—**

- (i.) **C. A.—Pauper—Maintenance.**—The Court has no jurisdiction, on the death of a pauper lunatic, to interfere with the right of his administrator by ordering payment of the expenses of his maintenance out of a fund in Court to which he had been entitled.—*Re Marman's Trusts*, 38 L.T. 797.

**Market:—**

- (i.) **C. A.—Immemorial Custom.**—Held that plaintiffs having shown a title to a Saturday market, a right to compel butchers to close their shops on Saturday and sell only in the market, or else to make payments in place of stallage might legally exist as incident to the market, and that there was sufficient evidence of enjoyment to establish such right.—*Mayor of Penryn v. Best*, L.R. 3 Ex. D. 292; 38 L.T. 805.

**Master and Servant:—**

- (i.) **Q. B. Div.—Dismissal—Proceedings in County Court—Res judicata.**—38 & 39 Vict., c. 90, ss. 3, 4.—Appellant having been discharged by respondents for neglect of work, and they having refused to pay wages in lieu of notice, he took proceedings in the County Court against them and recovered: Held that respondents were not precluded from preferring a claim before justices against appellant for damaging materials.—*Hindley v. Haslam*, L.R. 3 Q.B.D. 481.

**Metropolitan Management:—**

- (i.) **Q. B. Div.—Construction of Sewer—Apportionment.**—25 & 26 Vict., c. 102, s. 53.—Where a sewer had been constructed, in 1868, and no apportionment of the costs of construction among the owners of houses in the street was made till 1876: Held that the apportionment was valid.—*Bradley v. Greenwich Board of Works*, 38 L.T. 849.
- (ii.) **Ch. Div. M. R.—Party-wall—Undermining.**—18 & 19 Vict., c. 122.—Defendant dug beneath and undermined the wall which separated his own premises from those adjoining for the purpose of making alterations: notice was served on the adjoining owner, under the Metropolitan Building Act, 1855, and a surveyor appointed on each side, but they had not appointed a third surveyor: Held that defendant was acting within his rights as tenant in common of the wall and as adjoining owner under the Act, but that he should have waited till the appointment of the third surveyor, and must therefore pay the costs of a motion for injunction.—*Standard Bank of British South Africa v. Stokes*, 47 L.J. Ch. 554.
- (iii.) **C. A.—Vestryman—Qualification.**—Defendant occupied premises jointly with his father: a rate was made on the father only: defendant asked to have his name put on the rate, which was not done: afterwards he was nominated as vestryman, was declared elected and sat and voted, and subsequently was entered on the rate-book and paid the rate: Held that he was not qualified and liable to penalty.—*Goodhew v. Williams*, L.R. 3 C.P.D. 382.

**Mines:—**

- (i.) **Ch. Div. F. J.—Agreement—Construction—Winning—Expenses—Profits.**—M. granted to T. a license to work mines under an estate, and first to repay himself out of the profits, the expenses incurred in the winning of the coal only, and then to pay M. a certain proportion of the profits: Held that "winning" meant only the performance of all conditions necessary to the continuous working of the coal, and no expenses incurred afterwards were winning expenses: that interest of 4 per cent. should be allowed on the winning expenses, and that the profits arising



from the sale of coal were the gross returns less working expenses including 4 per cent. interest on capital.—*Lord Rokeby v. Elliot*, 38 L.T. 846.

- (ii.) **Q. B. Div.**—*Coal Mine—Inspector's Authority*—35 & 36 Vict., c. 76, ss. 46, 51.—The authority of an inspector to require a remedy for a danger in a mine under section 46 of Coal Mines Regulation Act, 1872, does not extend to requiring the withdrawal of workmen from the neighbourhood of the danger.—*Spon Lane Colliery Co. v. Baker*, 39 L.T. 13.
- (iii.) **Ex. Div.**—*Inclosure Act—Highway—Support*.—An Inclosure Act reserved to the lord of the manor rights and powers of working mines: *Held* that the lord was not entitled to work the mines so as to injure public roads.—*Benfieldside Local Board v. Consett Iron Co.*, 47 L.J. Ex. 491.
- (iv.) **C. A.**—*Lease—Quarry—Right to Work*.—To enable a termor punishable for waste to work mines or quarries it must be shown that the reversioner had commenced working them with a view of making a profit, or that they were worked by his express authority.—*Elias v. Griffith*, L.R. 8 Ch. D. 521; 38 L.T. 871; 26 W.R. 869.

### Mortgage :—

- (i.) **Ch. Div. F. J.**—*Breach of Covenant—Receipt of Interest—Waiver*.—A mortgage deed provided that if interest was paid punctually the mortgage should continue for two years: *Held* that the receipt of interest after default in punctual payment and notice to pay off did not constitute a waiver of mortgagee's right to call for immediate payment.—*Keene v. Biscoe*, 47 L.J. Ch. 644.
- (ii.) **Ch. Div. F. J.**—*Equitable Mortgage—Bankruptcy—Foreclosure*.—Where an equitable mortgage by deposit has been effected, and both mortgagor and mortgagee have become bankrupt, the trustee of the mortgagee is entitled to foreclosure.—*Waddell v. Toleman*, 38 L.T. 910; 26 W.R. 802.
- (iii.) **Ch. Div. V. C. H.**—*Foreclosure—Leaseholds*.—A mortgage of leaseholds by sub-demise, contained an absolute declaration of trust by mortgagor of his reversion. The mortgagor refusing to assign, judgment of foreclosure of the equity of redemption in the premises and of the reversion was given, but vesting order of the reversion refused till decree made absolute.—*British Empire Co. v. Sugden*, 47 L.J. Ch. 691.
- (iv.) **Ch. Div. M. R.**—*Mortgagee in Possession—Account*.—In an action for account by mortgagor against a mortgagee in possession, the mortgagor is entitled to an account of proceeds of sale received by mortgagee, or which, but for his wilful default, might have been received: but this does not entitle him to question the propriety of the sale or the adequacy of the price.—*Mayer v. Murray*, 47 L.J. Ch. 605.
- (v.) **C. J. B.**—*Payment in Nature of Penalty*.—By a mortgage of chattels in consideration of £400 lent, mortgagor covenanted to pay £544 by eight quarterly instalments, and if mortgagor became a liquidating debtor mortgagee was empowered to enter, sell, and repay himself all of the £544 then unpaid: *Held* that the provisions of the mortgage were not in the nature of a penalty.—*Ex parte Cochrane, Re Sendall*, 38 L.T. 820; 26 W.R. 818.
- (vi.) **Ch. Div. V. C. H.**—*Policy—Agreement to Assign*—30 & 31 Vict., c. 144.—A written agreement to execute a legal assignment of a life assurance policy when requested, is not an assignment within the Policies of Assurance Act, 1867, and notice of such agreement to the assurance office does not give priority under section 5 over the prior equitable title of a person who has not given notice.—*Spencer v. Clarke*, 47 L.J. Ch. 692.

- (vii.) **Ch. Div. F. J.—Priority—Registration—Notice.**—A solicitor mortgaged leasehold property in Middlesex to plaintiff, the mortgage not having been registered, and subsequently mortgaged the same property to W. who registered the mortgage: on both occasions he acted as mortgagee's solicitor: *Held* that the solicitor's knowledge of the earlier mortgage must be imputed to W., and, therefore, his mortgage could not be allowed priority.—*Bradley v. Riches*, 38 L.T. 810; 26 W.R. 910.
- (viii.) **Ch. Div. F. J.—Priority—Tacking—Consolidation.**—Two properties M. and S. having been separately mortgaged to A., S. was mortgaged to B., and afterwards M. to C. A being entitled to consolidate: *Held* that B. was entitled to redeem both the properties, and hold them as security for the amount paid to A. and his own debt.—*Brad'ey v. Riches* (2), 39 L.T. 78.
- (ix.) **Ch. Div. F. J.—Priority—Voluntary Deed—Consolidation—27 Eliz., c. 4.**—*Held*, on the facts of the case, that a mortgage deed executed to secure a sum of money previously lent was voluntary, and void against plaintiffs subsequent mortgagees, and that plaintiffs were not entitled to consolidate their mortgage with an equitable mortgage of other property by same mortgagor, which they had paid off but did not take an assignment of.—*Cracknall v. Janson*, 39 L.T. 31.
- (x.) **Ch. Div. V. C. H.—Reversionary Interest—Statute of Limitations.**—A mortgage of a reversionary interest in a mortgage debt which forms part of a residuary bequest with power to vary investments: *Held* not to be a mortgage of an interest in land within the meaning of section 42 of 3 & 4 Will. IV., c. 27: and that arrears of interest for more than six years could be recovered.—*Smith v. Hill*, 26 W.R. 878.
- (xi.) **Ch. Div. F. J.—Settled Property—Resulting Trust—Conversion.**—By a marriage settlement lands of the husband were settled to such uses as the husband and wife should jointly appoint, and, subject thereto, to the husband and wife in succession for life, with remainder for benefit of the children of the marriage, with ultimate remainder to the husband in fee: the husband and wife mortgaged the lands, and the proviso for redemption provided that the mortgagee should re-convey the property to the uses of the settlement: and there was a declaration that, if the power of sale were exercised, the mortgagee should pay the surplus proceeds of the sale to the husband, his heirs, executors, administrators, and assigns: the power of sale having been exercised after the husband's death: *Held* that there was no resulting trust of the surplus proceeds, but that they went to husband's legal personal representatives.—*Jones v. Davies*, 47 L.J. Ch. 554.

#### **Municipal Law:—**

- (i) **C. P. Div.—Nomination for Councillor—Qualification—Jurisdiction—38 & 39 Vict., c. 40.**—A person is entitled to be nominated for office of councillor for a borough, if otherwise qualified, if he is enrolled on the burgess roll in force at the time of election: the Court has jurisdiction to review the decision of the mayor who has allowed such an objection to a nomination.—*Budge v. Andrews*, 47 L.J. C.P. 586.
- (ii.) **C. A.—Penalty—5 & 6 Will. 4, c. 76, s. 126.—3 & 4 Vict., c. 97, s. 16.**—A penalty for impeding the officer of a railway company in the execution of his duty, summarily recovered before a borough justice, goes to the borough.—*Attorney-General v. Moore*, L.R. 3 Ex. D. 276.

#### **Negligence:—**

- (i) **C. P. Div.—Innkeeper—Liability for Injury to Guest.**—A statement of claim alleged that while plaintiff was staying at defendant's hotel as a guest for reward of defendant, by defendant's negligence the ceiling of a room fell down and injured plaintiff: *Held* that there was a good cause of action.—*Sandys v. Florence*, 47 L.J. C.P. 598.



**Palatine Court of Lancaster:—**

- (i.) **C. A.**—*Jurisdiction—Stay of Proceedings.*—The jurisdiction of the Palatine Court is co-ordinate with that of the High Court: the Palatine Court has no jurisdiction to restrain an action in the High Court.—*In re Alison's Trusts*, 47 L.J. Ch. 755.

**Partition:—**

- (i.) **V. C. M.**—*Sale*—31 & 32 Vict., c. 40, ss. 3, 5.—In a partition action, the owners of 3-16ths of the property asked for a sale, and the owners of 13-16ths wished to keep the property undivided, and offered to purchase the shares of the other parties: the Court ordered a valuation at Chambers of the 3-16ths, and sale of the same to the other owners. — *Gilbert v. Smith*, L.R. 8 Ch. D. 548; 26 W.R. 905.

**Partnership:—**

- (i.) **C. A.**—*Articles—Construction.*—Articles of partnership for 21 years between plaintiff and defendant, provided that the business should be carried on at certain premises, or in such other place or places as the partners might agree upon: the partners took other premises, and when the lease of these expired, the plaintiff refused to concur in a renewed lease: *Held* that he was entitled to an injunction restraining defendant, who had renewed the lease in his own name, from employing the assets or pledging the credit of the firm in carrying on the business at these premises.—*Clements v. Norris*, 47 L.J. Ch. 546.
- (ii.) **C. A.**—*Covenant not to Engage in other Business—Breach—Remedy.*—A covenant in a partnership deed that covenantor will not engage in any trade or business, except on account of and for the benefit of the partnership, will not enable the other partner to call for an account of profits made by the covenantor in a separate business for which he provides the capital out of his own moneys: the only remedy is by injunction, or dissolution, or damages.—*Dean v. M'Dowell*, 47 L.J. Ch. 537; 38 L.T. 862.
- (iii.) **Ch. Div. V. C. B.**—*Dissolution—Patent—Assignment to Company—Legal Title.*—A., a sole patentee, worked a patent with B. under circumstances constituting a partnership at will: afterwards A. left B., and assigned the patent to C. and D. as promoters of a company, the assignment being registered: on an action by the company for an injunction against B.: *Held* that he had acquired a right to work the patent, but that he had no right to have the company declared trustees for him of a moiety of the patent.—*Kenny's Buttonholeing Co. v. Somervell*, 38 L.T. 878; 26 W.R. 786.
- (iv.) **C. A.**—*Holding out as Partner—Bankruptcy—Reputed Ownership.*—P., carrying on business alone under the style of P., Son and Co., employed his son in the business, and held him out as a partner: P. and his son were jointly adjudicated bankrupts as ostensible partners: *Held* that P.'s separate estate being in the apparent possession of the firm with his consent, formed the joint estate of the firm.—*Ex parte Hayman, Re Pulsford*, 47 L.J. Bcy. 54.

**Patent:—**

- (i.) **C. A.**—*First and True Inventor—Communicated Knowledge*—21 Jas. I., c. 3.—A British subject who has had communicated to him in England by another British subject, an invention of the latter, is not the first and true inventor within the meaning of 21 Jas. I., c. 3: nor does the fact of his being the legal personal representative of the inventor, entitle him to take out letters patent.—*Marsden v. Saville Street Company*, 26 W.R. 784; 39 L.T. 97.
- (ii.) **H. L.**—*Infringement—Specification.*—Where the provisional speci-

cation of a patent claimed the use of two substances in combination, and the final specification claimed the use of one alone, and did not specify how it was to be employed: *Held* that no action for infringement would lie in respect of using the substance mentioned in the final specification alone.—*Bailey v. Robertson*, 38 L.T. 854.

### Poor Law:—

- (i.) **Q. B. Div.**—*Settlement by Residence—Receipt of Relief*—39 & 40 Vict., c. 61, s. 34.—Where a pauper had resided for three years in a parish so as to render himself irremovable, but such three years expired before the passing of 39 & 40 Vict., c. 61, and subsequently to the expiration of the three years had continued to reside in the same parish, but was in the receipt of parochial relief: *Held* that the receipt of the relief did not deprive the pauper of the settlement acquired by his status of irremovability.—*Regina v. Brompton Union*, L.R. 3 Q.B.D. 479.

### Power of Appointment:—

- (i.) **Ch. Div. V. C. H.**—*Successive Appointments—Insufficient Fund.*—The donee of a special power of appointment of £3,000 charged on certain property, made three appointments by successive deeds of £1,000 each to objects of the power. The security for the £3,000 proving inadequate: *Held*, that the appointees took according to the priority of appointments.—*Stokes v. Bridgeman*, 47 L.J. Ch. 759.

### Practice:—

- (i.) **Div. C. A.**—*Appeal—Attachment of Debt—Trial before Judge*—Ord. 45, r. 7.—Where on an attachment under a garnishee order by a judgment creditor for money due by judgment debtor, a third party claims the moneys and consents to a judge at chambers deciding the issue summarily, no appeal lies from such decision.—*Eade v. Winsor*, 47 L.J. Q.B. 584.
- (ii.) **C. A.**—*Appeal—Costs.*—Where a plaintiff had obtained an interim injunction in the Court below, giving the usual undertaking as to damages, and on the hearing the injunction was dissolved and the action dismissed, but without costs or any inquiry as to damages, though on appeal an inquiry as to damages may be directed, and a cross appeal by plaintiff is dismissed, the Court of Appeal has no power to vary the order as to costs in the Court below.—*Graham v. Campbell*, 47 L.J. Ch. 593.
- (iii.) **C. A.**—*Appeal—Costs—Judicature Act, 1873, s. 49—Ord. 55.*—An appeal will lie from an order directing the payment of a trustee's costs, charges, and expenses.—*Jones v. Chennell*, L.R. 8 Ch. D. 492; 47 L.J. Ch. 583.
- (iv.) **C. A.**—*Appeal—European Society Arbitration.*—By the European Arbitration Act, 1875, it was provided that no appeal should lie from any order made before the Act unless the arbitrator expressly certified in writing that it was desirable that such appeal should be brought: *Held* that a formal certificate from the arbitrator was necessary.—*Ex parte British Nation Association, Re European Arbitration*, L.R. 8 Ch. D. 679.
- (v.) **C. A.**—*Appeal—Informal Notice.*—A person against whom an order had been made in a winding-up, served the official liquidator with an informal notice, wherein he stated that it was his intention to appeal: *Held* that the notice was sufficient.—*Little's Case, Re West Jewell Mining Co.*, L.R. 8 Ch. D. 806.
- (vi.) **C. A.**—*Appeal—Mistake—Enlargement of Time—Ord. 57, r. 6.*—Appellant's solicitor, after giving notice of appeal from an interlocutory order within 21 days, believing the notice to be irregular, withdrew it,

and gave a fresh notice on the day after withdrawal, which was two days after the time limited for appealing: the Court gave special leave for an enlargement of time.—*Taylor's Case, Re Ambrose Lake Mining Co.*, L.R. 8 Ch. D. 643; 47 L.J. Ch. 696.

- (vii.) **C. A.**—*Appeal—Non-Suit—New Trial—Ord. 39, r. 1a; 40, r. 1.*—When a judge directs a non-suit and the facts are disputed, plaintiff cannot appeal to Court of Appeal, but must apply to Div. Court for a new trial.—*Etty v. Wilson*, 39 L.T. 83.
- (viii.) **C. A.**—*Appeal—Order in Chambers—Time.*—Where a judge has made an order in Chambers, and on rehearing affirmed the order in Court, an appeal lies to the Court of Appeal within 21 days of the order in Court: *Semble* applications for rehearings in Court of orders made in Chambers should be made within 21 days from order in Chambers.—*Dickson v. Harrison*, 38 L.T. 794.
- (ix.) **C. A.**—*Appeal—Quarter Sessions—Poor-Rate—Judicature Act, 1873, s. 19.*—An appeal having been brought from a decision of the Q. B. Div., on a case stated by the Quarter Sessions on appeal against a borough rate: the Court was equally divided as to whether it had jurisdiction to entertain the appeal.—*Regina v. Overseers of Walsall*, L.R. 3 Q.B.D. 457.
- (x.) **C. A.**—*Appeal—Time—Demurrer.*—An order allowing or over-ruling a demurrer is not an interlocutory order as respects the time for appealing.—*Trowell v. Shenton*, 26 W.R. 837.
- (xi.) **C. A.**—*Appeal from County Court—13 & 14 Vict., c. 61, s. 14; 39 & 40 Vict., c. 59, s. 20.*—An appeal lies to the Court of Appeal from the decision of the Divisional Court in a case stated under the County Courts Act, 1850, s. 14, if leave to appeal be given.—*Crush v. Turner*, L.R. 3 Ex. D. 303; 47 L.J. Ex. 639.
- (xii.) **P. D. A. Div.**—*Appeal from County Court—Admiralty Action—31 & 32 Vict., c. 71, s. 31.*—A plaintiff claiming an amount not exceeding £50 in an Admiralty action in a County Court, cannot appeal.—*The Falcon*, 47 L.J. P.D.A. 56.
- (xiii.) **C. A.**—*Appeal from Lord Mayor's Court—20 & 21 Vict., c. 157, ss. 10, 46.*—No appeal lies to the Court of Appeal from a decision of a Divisional Court on an appeal from the Lord Mayor's Court unless leave to appeal be given.—*Appleford v. Judkins*, 47 L.J. C.P. 615; 38 L.T. 801.
- (xiv.) **C. A.**—*Compromise of Action—Payment out of Court.*—S. having brought an action in the C. P. Div. against D. to recover a sum due for commission, commenced an action in the Chancery Div. to establish a lien on D.'s interest in a fund in administration there, and an order was made that £5,000 of the fund should be set apart to answer S.'s claim, further proceedings stayed till after trial of action in C. P. Div., with liberty to apply: subsequently an agreement was come to as to the amount of S.'s claim: *Held* that the Court had jurisdiction to direct the amount agreed upon to be paid out to S. out of the £5,000.—*Scully v. Lord Dundonald*, L.R. 8 Ch. D. 658.
- (xv.) **P. D. A. Div.**—*Costs—County Court Admiralty Jurisdiction—Wages—31 & 32 Vict., c. 71.*—In an action for master's wages and disbursements, a certificate under 31 & 32 Vict., c. 71, is not necessary to entitle a successful plaintiff to costs, though he recover less than £150, as a County Court has no jurisdiction in Admiralty over such a claim.—*The Dictator*, 38 L.T. 947.
- (xvi.) **C. A.**—*Costs—Detinue—30 & 31 Vict., c. 142, s. 5.*—In an action of detinue for a picture, plaintiff recovered £10 the assessed value of the picture and one shilling damages: *Held* that the action was founded on tort within 30 & 31 Vict., c. 142, s. 5.—*Bryant v. Herbert*, L.R. 3 C.P.D. 369; 39 L.T. 17; 26 W.R. 898.

- (xvii.) **C. P. Div.**—*Costs—Order of House of Lords.*—An action lies on the judgment of the House of Lords ordering an unsuccessful appellant to pay to respondent the costs of appeal.—*Marbella Iron Ore Co. v. Allen*, 47 L.J. C.P. 601; 38 L.T. 815.
- (xviii.) **Ch. Div. V. C. H.**—*Costs—Set-off—Solicitor's Lien.*—An order was made in a partnership suit confirming a compromise by which plaintiff took the assets and was to pay thereout the costs of the suit, and defendant was in a certain event to pay plaintiff a sum of money: The partnership assets were sufficient to pay all the costs, but plaintiff claimed to set-off the sum payable by defendant against the costs: on an application by defendant and his solicitor for payment of the costs: *Held* that the solicitor's lien precluded the set-off.—*Heiron v. Hobson*, 47 L.J. Ch. 574.
- (xix.) **C. P. Div.**—*Costs—Taxation.*—The effect of rule 8 of special allowances for costs in rules of Court, Aug., 1875, is to give the Master a discretion as to what allowances shall be made for the attendance of witnesses in Court, without regard to the old scale of charges.—*Turnbull v. Janson*, 26 W.R. 815.
- (xx.) **Ch. Div. M. R.**—*Costs—Taxation—Additional Rules, Aug., 1875, r. 18.*—Where defendant obtains an order to stay proceedings on payment of costs, it is the duty of the master when taxing the costs to determine questions raised as to the propriety of proceedings for which charges are made.—*Baines v. Wormsley*, 39 L.T. 85.
- (xxi.) **C. J. B.**—*Costs—Taxation—Attendance of Country Solicitor.*—A country solicitor personally attending an appeal instead of employing his London agent will be allowed on taxation the additional costs occasioned thereby.—*Ex parte Dickens, Re Foster*, L.R. 8 Ch.D. 598; 26 W.R. 915.
- (xxii.) **Ch. Div. F. J.**—*Costs—Taxation—Three Counsel—Shorthand Notes.*—On taxation between party and party, costs of employing more than two counsel may be allowed if the Court is of opinion that such a course was justifiable: in the absence of special directions at the trial the costs of copies of shorthand notes of evidence will not be allowed.—*Kirkwood v. Webster*, 26 W.R. 812.
- (xxiii.) **Ex. Div.**—*Costs—To follow Event—Ord. 55, r. 1.*—Where a new trial has been ordered, the party who succeeds at the second trial is, in the absence of special direction, entitled to costs of first trial under Ord. 55, r. 1.—*Field v. G. N. Rail. Co.*, L.R. 3 Ex. D. 261; 39 L.T. 80; 26 W.R. 817.
- (xxiv.) **Ch. Div. V. C. B.**—*Counter-claim—Wife's Separate Estate.*—In an action seeking to charge a wife's separate estate in respect of a debt due to plaintiff, to which the husband was made a party: a counter-claim in respect of moneys due to the husband and pictures of the husband detained by the plaintiff was allowed.—*Hodson v. Mochi*, L.R. 8 Ch. D. 569; 47 L.J. Ch. 604.
- (xxv.) **C. A.**—*Court Fees—Forma Pauperis.*—The Chief Clerk's certificate ordered to be delivered out without payment of Court fees, plaintiff having, since it was ready, obtained an order to sue *in forma pauperis*.—*Thomas v. Ellis*, L.R. 8 Ch. D. 518; 26 W.R. 839.
- (xxvi.) **Ch. Div. M. R.**—*Default of Appearance—Payment into Court.*—In an administrative action, notice of motion was served on defendant, an executor, for payment into Court of money, part of testator's estate, which it was shown by affidavit that he had received: defendant did not appear: *Held* that he had sufficiently admitted that the money was in his hands by not answering the affidavit, and that he must pay it into Court.—*Freeman v. Cox*, 47 L.J. Ch. 560.
- (xxvii.) **C. A.**—*Default of Appearance—Setting Aside Judgment—Ord. 36, r. 20.*

- Where through a mistake either party fails to appear on an action being called on for trial, and judgment is given in default of appearance, it is a matter of course to restore the action on payment of costs of the day, when an application is made within due time.—*Burgoine v. Taylor*, 47 L.J. Ch. 542.
- (xxviii.) **Ch. Div. F. J.**—*Default of Appearance—Setting Aside Judgment—Costs.*—Judgment dismissing an action for default of appearance by plaintiff, was set aside on terms of plaintiff paying costs of previous trial and of motion to set aside.—*Cockle v. Joyce*, *Wright v. Clifford*, 47 L.J. Ch. 543.
- (xxix.) **Ch. Div. F. J.**—*Default of Appearance—Test Action—Ord. 36, r. 19.*—Where, at the trial, a plaintiff declined to proceed, the Court declined to take into consideration the fact that the action had been made a test action for the purpose of deciding rights between plaintiffs in similar actions and the same defendants, but ordered the action to be dismissed, with costs.—*Robinson v. Chadwick*, 47 L.J. Ch. 607.
- (xxx.) **C. A.**—*Default of Appearance—Test Action.*—Where one of several actions against same defendants has been ordered to be tried as a test action, and plaintiff in such action lets judgment go by default, the Court may substitute another action as the test action.—*Amos v. Chadwick*, 39 L.T. 50 ; 26 N.R. 840.
- (xxxi.) **Ch. Div. V. C. H.**—*Discovery—Affidavit of Documents.*—In an action for account in which the issue of settled accounts was raised, defendant was ordered to make an affidavit of documents claimed to be covered by the settled accounts.—*Dickson v. Harrison*, 47 L.J. Ch. 686.
- (xxxii.) **Ch. Div. V. C. M.**—*Discovery—Interrogatories—Member of Corporation—Ord. 31, rr. 4, 5.*—On an application for an order to serve interrogatories on a member of a company the Court will not look at the interrogatories, but will only consider the fitness of the member to give information.—*Berkesley v. Standard Discount Co.*, 26 W.R. 852.
- (xxxiii.) **C. A.**—*Discovery—Interrogatories—Tendency to Criminate—Ord. 31, r. 8.*—Where interrogatories inquire after matters amounting to an indictable offence they ought not to be struck out, but the party interrogated may decline to answer them as tending to criminate : a party may decline to answer under Order 31, r. 8, though he might have applied to have the interrogatories struck out under Ord. 31, r. 5.—*Fisher v. Owen*, L.R. 8 Ch. D. 645 ; 47 L.J. Ch. 681.
- (xxxiv.) **Ch. Div. V. C. H.**—*Discovery—Interrogatories—Service—Ord. 31, r. 21.*—The service of an order to answer interrogatories and the notice of motion for attachment in default on the solicitor of the defaulting party is sufficient.—*In re Mulcaster*, *Dalston v. Nanson*, 47 L.J. Ch. 609.
- (xxxv.) **P. D. A. Div.**—*Discovery—Privilege.*—Reports of a survey of a ship made before action brought, are privileged if made solely for purpose of the action.—*The Theodora Korner*, 38 L.T. 818.
- (xxxvi.) **C. A.**—*Evidence—Appeal—Further Evidence—Ord. 58, r. 5.*—Affidavits which were used in chambers were rejected, on further consideration : plaintiff, in his notice of appeal, gave notice of motion for leave to read them : *Held* that they were further evidence within Ord. 58, r. 5, and leave given to read them.—*Jones v. Chennell*, L.R. 8 Ch. D. 492 ; 47 L.J. Ch. 583.
- (xxxvii.) **C. C. R.**—*Evidence—Deposition—Pregnancy—11 & 12 Vict., c. 42, s. 17.*—Pregnancy alone may be a source of illness within 11 & 12 Vict., c. 42, s. 17, so as to give the judge power to admit in evidence in a prosecution the deposition of a witness unable to travel in consequence of her approaching confinement.—*Regina v. Wellings*, L.R. 3 Q.B.D. 426.

- (xxxviii.) **Ex. Div.**—*Execution—Order to Pay Amount Levied—Notice to Sheriff*—Ord. 53, rr. 1, 2.—An application for an order to compel a sheriff who has returned a writ of *fi. fa.* to pay over the amount levied is a proceeding in an action within Ord. 53, r. 1, 2, and should be made on motion after notice to sheriff.—*Delmar v. Freemantle*, L.R. 3 Ex. D. 237.
- (xxxix.) **C. A.**—*Inrollment of Decree—Bill of Review*.—Held that the inrollment of a decree made in the presence of A. in an administration suit, whereby it was declared that certain property belonged to T. beneficially, did not render it necessary for A. to file a bill of review and to vacate the inrollment before instituting a suit to set aside a sale whereby T. claimed to have become the beneficial owner of the property.—*Widgery v. Tepper*, 47 L.J. Ch. 550.
- (xl.) **C. P. Div.**—*Interpleader—Claim for Part of Goods*.—On an interpleader issue claimant was ordered to specify which of the goods seized he claimed, but did not do so: a verdict having been found for claimant as to part of the goods only: Held that the execution creditor was entitled to the amount paid into Court under the interpleader order and that claimant must pay the costs of the trial.—*Plummer v. Price*, 39 L.T. 38.
- (xli.) **C. P. Div.**—*Interpleader*—1 & 2 Will. 4, c. 58, s. 1.—L. sent wine to London to D., which D. deposited with a dock company and received dock warrants making the wine deliverable to D. or his assigns, which he indorsed to plaintiff: L. served the company with notice not to part with the wine which he alleged had been obtained from him by fraud, and plaintiff brought an action against the company for detaining the wine: Held that the company could not interplead.—*Attenborough v. St. Katherine's Dock Co.*, L.R. 3 C.P.D. 373.
- (xlii.) **C. A.**—*Order for Sale—Admission*—Ord. 40, r. 11.—In a suit commenced under the old practice, when plaintiff claimed a charge on bonds deposited in the bank to the credit of the cause, which defendant admitted, the Court ordered a sale of the bonds on plaintiff's application before trial under Ord. 40, r. 11.—*Coddington v. Jacksonville Rail. Co.*, 39 L.T. 12.
- (xliii.) **C. A.**—*Parties—Administrator ad Litem*.—An administrator *ad litem* does not sufficiently represent the estate in an action where plaintiff seeks to establish his title as sole next of kin of an intestate.—*Dowdeswell v. Dowdeswell*, 38 L.T. 828.
- (xliv.) **Ch. Div. M. R.**—*Parties—Conflicting Interest*.—A., who was interested under a will, died insolvent, and his creditors obtained an administration decree: A.'s executrix, who had also an interest under the will opposed to that of A., was made defendant in another action for the administration of the trusts of the will, and the creditors obtained an order for leave to intervene in this action: Held that the order was irregular, and that some other person ought to have been appointed to defend in the action in the name of the executrix on the behalf of the son's estate.—*Samuel v. Samuel*, 47 L.J. Ch. 716.
- (xlv.) **Ch. Div. V. C. H.**—*Parties—Infant Plaintiff*—Ord. 16, r. 8.—In an action for breach of trust and execution of the trusts of a will by infants by their step-father as next friend, who was also made a defendant, the Court ordered his name to be struck out as defendant, and gave the wife leave to defend without her husband.—*Lewis v. Nobbs*, L.R. 8 Ch. D. 591; 47 L.J. Ch. 662.
- (xlvi.) **Ch. Div. V. C. M.**—*Parties—Joinder*—Ord. 16, r. 17.—Plaintiff having bought property from defendant brought an action to have £2,000 of the purchase-money returned to him: defendant was also being sued in the Ex. Div. for the £2,000 by persons claiming it as commission on the sale: the Court refused to order the plaintiffs in the Ex.



Div. to be served with a third party notice, or made defendants to this action under Ord. 16, r. 17.—*Associated Home Co. v. Whichcord*, 47 L.J. Ch. 652.

- (xlvii.) **Ch. Div. V. C. M.**—*Parties—Partition*—31 & 32 Vict., c. 40.—In a partition action relating to leasehold property, where plaintiffs were executors and trustees for sale, entitled to part of the property, and defendants were a person entitled to the rest of the property for life, and other executors and trustees for sale entitled in remainder, it was *Held* that the beneficiaries under the trusts were not necessary parties.—*Stace v. Gage*, 47 L.J. Ch. 608; 38 L.T. 843.
- (xlviii.) **C. P. Div.**—*Parties—Married Woman—Separate Estate*—33 & 34 Vict., c. 93.—A married woman cannot be sued in respect of her separate estate for the price of goods sold to her during coverture, without joining her husband as defendant—*Hancocks v. Lablache*, 47 L.J. C.P. 514.
- (xlix.) **Ch. Div. F. J.**—*Payment into Court—Omission in Trustee's Affidavit*—10 & 11 Vict., c. 96.—Where a trustee paying into Court under the Trustee Relief Act omits in his affidavit the name of one of the persons entitled to any of the moneys, the proper course for such person to pursue, in order to obtain payment out, is to apply by petition.—*Pilling v. Goddard*, 47 L.J. Ch. 646; 38 L.T. 811.
- (l.) **Ch. Div. V. C. H.**—*Pleading—Claim in Representative Character—Demurrer*.—When a plaintiff sues in a representative character, the statement of claim is to be read for the purposes of demurrer, as if that fact were stated therein.—*Johnson v. Burges*, 47 L.J. Ch. 552.
- (li.) **Ex. Div.**—*Pleading—Counter-Claim—Set-off*.—In an action by the assignor of a debt, the debtors pleaded, by way of set-off and counter-claim, damages for breach of contract by the assignor: *Held* that he could not recover damages against the plaintiff, but was entitled by way of set-off against the plaintiff's claim, to the damages sustained from the breach of contract by the assignor.—*Young v. Kitchen*, 47 L.J. Ex. 579.
- (lii.) **Ch. Div. M. R.**—*Pleading—Counter-Claim—Ord. 49, r. 3*.—Where to an action for dissolution of partnership defendant set up a counter-claim raising a different cause of action: *Held* that such claim could not be conveniently disposed of in the action.—*Naylor v. Farrer*, 26 W.R. 809.
- (liii.) **C. A.**—*Pleading—Payment into Court—Denial of Cause of Action*.—As a general rule a defendant may deny plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole or any part of them.—*Berdan v. Greenwood*, L.R. 3 Ex. D. 251; 47 L.J. Ex. 628; 26 W.R. 902.
- (liv.) **Ch. Div. F. J.**—*Pleading—Set-off—Ne exeat regno—Damages*.—A defendant need not, in claiming set-off, separate the claim or the statement of facts relied upon, in any way, from his statement of defence: in claiming damages for a writ of *Ne exeat regno*, alleged to have been improperly obtained, the applicant should first move to discharge the writ.—*Lees v. Patterson*, 47 L.J. Ch. 616.
- (lv.) **C. A.**—*Reference—Error of Referee—Judicature Act, 1873, s. 56*.—A judge has no power to alter or vary the report of a special referee: If he refuses to adopt it, he must either hear the case himself or remit the report to the referee.—*Dunkirk Hall Colliery Co. v. Lever*, 25 W.R. 841.
- (lvi.) **C. P. Div.**—*Security for Costs*.—Where, after an action had been set down for trial, plaintiff filed a liquidation petition, he was ordered to give security for past as well as future costs.—*Brocklebank v. King's Lynn Steamship Co.*, L.R. 3 C.P.D. 365.

- (lvii.) **C. A.**—*Security for Costs.—Admiralty Action—Joinder of Action—Counter-Claim against one Plaintiff.*—Where owners of a ship which has sunk and owners of the cargo on board join as plaintiffs in an action against another ship for damages sustained by collision, the Court will order the claim by the shipowner to be dismissed in default of his giving security for the counter-claim, but will allow the owner of the cargo to proceed without security.—*The Carnarvon Castle*, 26 W.R. 876.
- (lviii.) **C. A.**—*Staying Proceedings—Pending Appeal—Ord. 58, rr. 16, 17.*—An application to stay proceedings pending an appeal must be made first to the judge of the Court below.—*Attorney-General v. Swansea Improvements Co.*, 26 W.R. 840.
- (lix.) **C. A.**—*Substituted Service—Setting Aside Judgment—Ord. 9, r. 2.*—In an action against A. and others an order for substituted service against A. having been obtained, and judgment against all the defendants given, A. applied to set aside the judgment against him on affidavits, alleging ignorance of the action while pending and merits: judgment was set aside on terms as to giving security for the amount of the judgment and for costs.—*Watt v. Barnett*, 38 L.T. 903.
- (lx.) **Ch. Div. M. R.**—*Trial—Jury.*—In an action against directors for fraud and misrepresentation, a motion by one defendant to have the action tried before a judge and jury was refused, on the grounds that the other defendant did not consent, and that, under the circumstances, such a trial did not appear desirable or convenient.—*Mirehouse v. Barnett*, 47 L.J. Ch. 689.
- (lxi.) **C. A.**—*Trial—Jury.*—Where parties to an action agree to take evidence by affidavit, the Court will not, on the application of either party, grant a jury after evidence has been taken.—*Brooke v. Wigg*, L.R. 8 Ch. D. 510; 47 L.J. Ch. 749.
- (lxii.) **Ch. Div. V. C. H.**—*Writ of Possession—Writ of Assistance—Ord. 48.*—Under Order 48 a writ of possession is now substituted for the writ of assistance both between parties and as against strangers to the action.—*Hall v. Hall*, 47 L.J. Ch. 680.

#### Principal and Agent:—

- (i.) **P. C.**—*Commission Agent.—Held*, on the evidence, that A. was the agent of B.—*Hood v. Stallybrass, Balmer & Co.*, L.R. 3 App. 880; 38 L.T. 826.
- (ii.) **Q. B. Div.**—*Corrupt Bargain—Bias.*—Where a bargain is made between one who is in the employ of another and a third party, who has contracted with the employer, which is calculated to bias the mind of the employed and cause him to act to the prejudice of the employer, such bargain is corrupt, even though no damage result to the employer.—*Harrington v. Victoria Graving Dock Co.*, L.R. 3 Q.B.D. 549; 47 L.J. Q.B. 594.
- (iii.) **Ch. Div. F. J.**—*Payment to Agent—Set-off of Debt.*—Where A. owes money to B., and B. authorises him to pay it to C., he must actually pay the money to C., and is not entitled to set-off a debt due to him from C. against the payment of the debt to A.—*Pierson v. Scott*, 47 L.J. Ch. 705; 26 W.R. 796.
- (iv.) **Ch. Div. F. J.**—*Settled Accounts—Right to Surcharge and Falsify—Costs.*—In an action for account by a principal against his agent, plaintiff showed five items of error in order to surcharge and falsify a series of settled accounts: defendant set up no such right in the pleadings, but claimed it at the bar: *Held* that plaintiff was entitled to surcharge and falsify all the accounts, but defendants were not so entitled.—*Mosley v. Cowie*, 38 L.T. 908; 26 W.R. 854.



**Principal and Surety :—**

- (i.) **C. A.—Discharge—Alteration of Contract—New Tenancy.**—Plaintiff let to B. a farm of 234 acres, and stock of 700 sheep: defendants entered into a bond as sureties to secure the return of an equal number of sheep by B. at the end of the tenancy: subsequently plaintiff and B. agreed that a field of seven acres should be surrendered to plaintiff: *Held* that defendants were discharged from their liability.—*Holme v. Brunskill*, L.R. 3 Q.B.D. 495; 47 L.J. Q.B. 610; 38 L.T. 838.
- (ii.) **Ch. Div. F. J.—Change of Circumstances—Concealment—Discharge.**—The officer of a company believing that the retention of money by one of its agents amounted to felony directed his arrest: friends of the agent offered to deposit a sum of money as security for any deficiency: and afterwards the company was advised that the acts of the agent did not amount to felony and the directions for his arrest were withdrawn: in a subsequent interview with the officer, the offer of the agent's friends was accepted without telling them of the withdrawal of the directions for arrest, and the money was deposited with trustees: *Held* that the concealment of the change of circumstances from the sureties was improper and the money must be returned.—*Davies v. London & Provincial Marine Insurance Co.*, 26 W.R. 794.

**Probate :—**

- (i.) **P. D. A. Div.—Costs—Married Woman.**—In an action for probate tried by a jury, in which verdict was for plaintiff: *Held* that a married woman defendant having general personal estate might be condemned in costs.—*Morris v. Freeman*, L.R. 3 P.D. 65.
- (ii.) **P. D. A. Div.—Costs out of Real Estate.**—Where probate of a will had been justifiably opposed, and it appeared that there was no personalty, the Court ordered the costs of defendant to be paid rateably out of the real estate.—*Smith v. Hopkinson*, 47 L.J. P.D.A. 40; 26 W.R. 884.
- (iii.) **P. D. A. Div.—Incorporation—Attestation on Third Page.**—A will written on a sheet of paper had the attestation clause on the third page and the words "turn over," and on the fourth page a clause dated the day of execution of the will, and signed by the testator; at the time of witnessing the witnesses saw writing on the fourth page: *Held* that the writing on the fourth page could not be included in probate.—*In the Goods of Dearle*, 47 L.J. P.D.A. 45; 39 L.T. 93.
- (iv.) **P. D. A. Div.—Incorporation—Writing on Different Page.**—Testatrix made a testamentary disposition on the first three pages of a sheet of paper, signed, but not attested. Subsequently she duly executed a testamentary disposition (not referring to the former one) on the fourth page: *Held* that the contents of the first three pages were not incorporated in her will.—*In the Goods of Tovey*, 47 L.J. P.D.A. 63.
- (v.) **C. A.—Married Woman—Separate Estate—Jurisdiction.**—Before granting probate of the will of a married woman, though it is only necessary for the Court to be satisfied that testatrix had a power, or separate estate, it should decide to what effects the probate is to extend unless the matter can be more conveniently determined elsewhere.—*In the Goods of Tharp*, *Tharp v. Macdonald*, 38 L.T. 867.
- (vi.) **P. D. A. Div.—Two Wills—Compromise.**—By consent of parties the Court will grant probate to two testamentary instruments if not inconsistent with one another.—*Robinson v. Clarke*, 39 L.T. 43.

**Public Health :—**

- (i.) **C. P. Div.—Building—Bye-Laws—Publication.**—11 & 12 Vict., c. 63; 21 & 22 Vict., c. 98; 10 & 11 Vict., c. 34.—Bye-laws were made by commissioners under powers conferred by the Public Health Acts, 1848 and

1858, and the Towns Improvement Act, 1847, providing that notice should be given to the surveyor of any new building intended to be erected: the bye-laws were published in accordance with the requirements of the Public Health Acts, but not with those of the Towns Improvement Act: *Held* that the bye-laws had been sufficiently published, but that the term "building" did not apply to a brick-kiln and structure for storing tools erected for temporary purposes.—*Fielding v. Rhyl Commissioners*, 26 W.R. 891.

- (ii.) **Q. B. Div.**—*Dismissal of Officer—Quo Warranto*.—The Court refused to grant a rule for a *quo warranto*, applied for by a former officer of a local board, on the ground that his dismissal from office was illegal, as it appeared that if re-instated, he might legally be dismissed immediately.—*Ex parte Richards*, 47 L.J. Q.B. 498.
- (iii.) **C. P. Div.**—*Local Authority—Verbal Contract by*—11 & 12 Vict., c. 63, s. 85; 38 & 39 Vict., c. 55, s. 173.—A local board within the Public Health Act, 1848, and urban authority within the Public Health Act, 1875, verbally directed their surveyor to prepare plans for new offices: *Held* that, as the value of the contract exceeded £50, it could not be enforced against the local board, and that part performance made no difference in this respect.—*Hunt v. Wimbledon Local Board*, 47 L.J. C.P. 540; 39 L.T. 35; 26 W.R. 830.
- (iv.) **C. P. Div.**—*Local Authority—Liability—Sewer—Notice of Action*.—A local board, which was both a highway and a sewer authority, engaged a contractor to lay down a sewer, who was to be responsible for damage arising from the execution of the works, and to maintain the road in repair for three months from completion of contract: after the expiration of the three months, the road gave way in one place owing to defective filling up of the trench, and in consequence plaintiff's horse was injured: *Held* that the local board was liable: a notice of action which claimed for damage caused by non-feasance: *Held* sufficient, although in fact the injury was caused by mis-feasance.—*Smith v. West Derby Local Board*, 47 L.J. C.P. 607.

#### Queensland, Law of:—

- (i.) **P. C.**—*Crown Lands Alienation Act, 1868*.—Section 46 of this Act enacts that an applicant for lands must make a declaration that he lives in Queensland: *Held* that "lives" must be taken in its popular meaning as denoting more than a transient presence in the colony, though not necessarily an intention to create a new domicile; and that a misrepresentation in the declaration avoided the whole contract.—*Fisher v. Tully*, 47 L.J. P.C. 59.
- (ii.) **P. C.**—*Crown Lands Alienation Act, 1868—Decision in Open Court—Residence*.—The provision in sec. 3 of this Act that all questions shall be decided by the commissioner, who shall give judgment in open court, applies to questions relating to the forfeiture of lands, and requires a hearing in open court: where a selector makes an additional selection under sec. 55, he is not required to continue to reside on his first selection.—*Smith v. The Queen*, 47 L.J. P.C. 51.

#### Railway:—

- (i.) **Ex. Div.**—*Carrier—Alternative Rates*.—When a railway company charges alternative rates for the conveyance of cattle, the lower being at owner's risk, if the higher rate is within the Parliamentary limit it is *a priori* reasonable, though the difference between the rates may be so great that cattle dealers always avail themselves of the lower.—*Foreman v. G. W. Rail. Co.*, 38 L.T. 851.
- (ii.) **Ch. Div. V. C. M.**—*Easement—Owner of Adjoining Land—Light and Air*.—The owner of land on which a railway had been constructed,

erected a house with windows overlooking the line; and the company erected a hoarding before the windows to prevent the owner from acquiring a prescriptive right to light and air: *Held* that the company had no right to prevent the acquisition of such an easement.—*Norton v. L. & N. W. Rail. Co.*, 39 L.T. 25.

- (iii.) **H. L.**—*Level Crossing—Private Railway*—5 & 6 Vict., c. 55, s. 9.—The provisions of 5 & 6 Vict., c. 55, s. 9, as to making gates at level crossings, do not apply to a private railway not constructed under Parliamentary powers or for conveyance of passengers.—*Matson v. Baird*, 26 W.R. 835.
- (iv.) **C. P. Div.**—*Passenger—Ticket—Penalty—Intention to Defraud*—8 & 9 Vict., c. 20, ss. 103, 109.—A bye-law of a railway company that a passenger travelling without a ticket shall pay the fare from the place whence the train started to the end of his journey is void as being contrary to secs. 103 and 109 of the Railways Clauses Act, 1845, and unreasonable.—*London & Brighton Rail. Co. v. Watson*, 47 L.J. C.P. 634; 26 W.R. 856.
- (v.) **H. L.**—*Undue Preference*—8 & 9 Vict., c. 20, s. 90—17 & 18 Vict., c. 31, s. 2.—Defendants gratuitously carted goods of three brewers, and allowed them certain rebates: *Held* that plaintiff, a brewer, being charged for cartage, and allowed no rebate, could maintain an action for undue preference.—*London and North-Western Rail. Co. v. Evershed*, 26 W.R. 863.

#### Revenue:—

- (i.) **C. A.**—*Stamp Duty—Medicine—Mineral Water*—52 Geo. 3, c. 150; 3 & 4 Will. 4, c. 97.—Defendant sold a composition of carbonate of soda, tartaric acid, and chlorate of potash, which he advertised as a medicine: *Held* that it was not liable to duty.—*Attorney-General v. Lamplough*, L.R. 3 Ex. D. 214; 47 L.J. Ex. 555.

#### Scotland, Law of:—

- (i.) **H. L.**—*Tiends—Repetition—Prescription*.—Forty years after heritors, who had never paid any stipend, had sold their land and left the parish, a claim for repetition of tiends was brought against them: *Held* that the right to reconpment was barred by lapse of time.—*Davidson v. Sinclair*, L.R. 3 App. 765.

#### Settled Estates Act:—

- (i.) **Ch. Div. V. C. M.**—*Sale Generally*.—The Court may, under section 16 of the Settled Estates Act, 1877, sanction a sale generally.—*Re Andrews' Settled Estates*, 38 L.T. 877; 26 W.R. 811.
- (ii.) **Ch. Div. V. C. M.**—*Sale Generally*.—The Court ordered a sale generally on a petition under the Act, either by auction or private contract, subject to a reserve price to be settled at chambers, the trustees to bring the proceeds into Court.—*Re Adam's Settled Estates*, 38 L.T. 877.

#### Settlement:—

- (i.) **Ch. Div. V. C. B.**—*Construction—Gift Over*.—Property was settled on trust to apply the income for the maintenance of two children till the younger should attain twenty-one, and then to pay the income to them, their heirs and assigns, in equal shares: provided that if either of them should die without leaving issue, his share of the income was given over: one of the children attained twenty-one, and died leaving issue: *Held* that he took an estate in fee simple as his share.—*Olivant v. Wright*, 47 L.J. Ch. 664.
- (ii.) **C. A.**—*Post-Nuptial Settlement—Anti-Nuptial Agreement—Infant—Ratification*.—An infant before marriage promised that he would give his

intended wife when he came of age seven houses : he subsequently came of age and married, and some years after settled nine houses on his wife for life, remainder to himself for life, remainder to his wife in fee : *Held* that this was not a ratification of the anti-nuptial agreement, and was bad against a purchaser from husband.—*Trowell v. Shenton*, 47 L.J. Ch. 738 ; 26 W.R. 837.

- (iii.) **C. A.**—*Satisfaction—Will—Parol Evidence*.—T. covenanted to settle £2,000 consols in trust as Mrs. W. should appoint, in default to her separate use for life, remainder to her husband for life, remainder to the children of the marriage, and, if no children, remainder to husband : T. subsequently performed the covenant as to £1,000, and by his will gave £2,800 for Mrs. W.'s separate use for life without power of anticipation and then for her children : *Held* that this was not a satisfaction of the covenant : parol evidence is admissible to rebut but not to raise the presumption of satisfaction.—*Tussaud v. Tussaud*, 26 W.R. 874.
- (iv.) **C. A.**—*Tenant in Tail—Disentailing Deed—Protector—3 & 4 Will. 4., c. 74, s. 22*.—Where the equity of redemption of a freehold estate was vested in trustees in trust for a married woman for separate use for life remainder to B. in tail : *Held* that the owner of the prior estate in the 23rd section of the Fines and Recoveries Act was the married woman.—*Re Dudson's Contract*, L.R. 8 Ch. D. 628 ; 47 L.J. Ch. 632.
- (v.) **Ch. Div. V. C. M.**—*Voluntary Settlement—Declaration of Trust*.—B. by a deed poll, after reciting his intention to settle certain property on his wife, settled, assigned, and transferred to her, as though she were a single woman, the property : *Held* that the deed operated as a declaration of trust.—*Baddeley v. Baddeley*, 38 L.T. 906 ; 26 W.R. 850.

#### Ship :—

- (i.) **C. A.**—*Authority of Master—Sale of Cargo*.—The master of a ship has *prima facie* no authority to sell the cargo : and to justify a sale, without the authority of the owners, he must show an urgent necessity for the sale and inability to communicate with the owners.—*Acatos v. Burns*, L.R. 3 Ex. D. 282 ; 47 L.J. Ex. 566.
- (ii) **C. A.**—*Authority of Ship's Husband—Pledging Freight*.—R., part owner of a ship, who had mortgaged his share, and who was also acting as ship's husband, assigned to plaintiff the freight payable by the charterers in respect of a voyage then unfinished : before the end of the voyage, the other owners of the ship and R.'s mortgagee appointed another ship's husband, who gave the charterers notice not to pay the freight to plaintiff : *Held* that R. had no power to assign the whole freight, and that the mortgagee had effectually interfered so as to entitle himself to R.'s share of the freight as against R. and the plaintiff.—*Beynon v. Godden*, L.R. 3 Ex. D. 263 ; 39 L.T. 82.
- (iii.) **C. A.**—*Bill of Lading—Charter-party—Demurrage*.—The defendants, consignees of part of cargo, were prevented from landing their goods within the time allowed through the delay of other consignees : the charter-party allowed fourteen days for loading and unloading, "and ten days on demurrage at £35 per day : " the bills of lading contained the words, "paying freight for the same goods and all other conditions as per charter-party : " *Held* that defendants were liable for demurrage.—*Porteus v. Watney*, L.R. 3 Q.B.D. 534 ; 47 L.J. Q. B. 643.
- (iv.) **C. A.**—*Charter-party—Despatch Money*.—A charter-party provided for the payment by the shipowner to charterer of despatch money at 10s. per hour on any time saved in loading <sup>and</sup> or unloading : *Held* that dispatch

money was payable in respect of each hour saved, taking a day to contain twenty-four hours.—*Laing v. Holloway*, L.R. 3 Q.B.D. 437 ; 47 L.J. Q.B. 512.

- (v.) **C. A.**—*Collision—Crossing Ships—Navigation of Thames.*—When one steamer on the Thames was steering parallel to the shore, and the other obliquely across the stream: *Held* that they were crossing vessels, and under rule 29 of Rules for Navigation of Thames, 1872, the one which had the other on her starboard was bound to keep out of the way.—*The Oceano*, L.R. 3 P.D. 60.
- (vi.) **P. D. A. Div.**—*Compulsory Pilotage.*—A vessel in charge of a pilot, whom the master was compelled to take, and who was engaged to take her into dock, was brought to anchor, being prevented by the weather from docking, and drove into collision with another vessel: *Held* that she was under the charge of the pilot.—*The Princeton*, 47 L.J. P.D.A. 33.
- (vii.) **Q. B. Div.**—*Demurrage—Contract to Deliver during Specified Months.*—Defendants contracted to buy from plaintiff from 5,000 to 6,000 tons of ore to be delivered at C. during the months of June, July, August, and September: *Held* that the contract could not be read as if equal monthly instalments were intended.—*Calaminus v. Doulais Ore Co.*, 47 L.J. Q.B. 575.
- (viii.) **P. D. A. Div.**—*Foreign Ship—Jurisdiction.*—In an action of co-ownership by a foreigner against a foreign vessel, the representative of the State to which the vessel belonged refused to interfere: on application of another foreigner, who appeared under protest, the action was dismissed with costs.—*The Agincourt*, 47 L.J. P.D.A. 37.
- (ix.) **Q. B. Div.**—*General Average—Salvage Services.*—A ship having stranded in the course of a voyage to L., the shipowner sent over persons to undertake salvage operations, and the whole cargo was saved and brought to L., and the freight earned: the shipowner incurred considerable trouble and expense in getting the cargo to L., identifying and distributing it, and in the general average statement a remuneration to him was charged for arranging for salvage operations and distributing the cargo: *Held* the charge was improper.—*Schuster v. Fletcher*, 47 L.J. Q.B. 530.
- (x.) **C. A.**—*Insurance—Constructive Total Loss—Notice of Abandonment.*—Plaintiff received at Singapore on Feb. 7th, reports of damage sustained by his vessel from which he determined to treat the loss as a constructive total loss: the vessel was sold on Feb. 23rd, and reports forwarded to co-owner at Z., which reached the underwriters on March 11th: *Held* that plaintiff was not excused from giving notice of abandonment to the underwriters, that no proper notice was given, and therefore he could not recover on his policy.—*Kaltenbach v. Mackenzie*, 38 L.T. 942 ; 26 W.R. 844.
- (xi.) **C. A.**—*Insurance—Partial Loss—Repairs.*—A shipowner effected a policy on a ship which sustained damage at sea, and salvage expenses were incurred: the owner refused to abandon, and the ship was repaired: *Held* that the measure of damages was to be ascertained by the cost of repairs less one-third new for old, though the underwriters would in fact be liable for more than a total loss, with benefit of salvage; and that they were liable for a proportion of salvage expenses beyond the amount of the insurance.—*Lohre v. Aitchison*, L.R. 3 Q.B.D. 558 ; 47 L.J. Q.B. 534 ; 38 L.T. 802 ; 26 W.R. 780.
- (xii.) **C. A.**—*Insurance—Seaworthiness—Onus of Proof.*—In an action on a voyage policy, the question whether the circumstances are sufficient to raise a presumption that the ship was not seaworthy at the commencement of the risk, and to throw the onus of proving her so, on the owner, is a question of fact for the jury.—*Pickup v. Thames and Mersey Marine Insurance Co.*, L.R. 3 Q.B.D. 594.

- (xiii.) **C. A.**—*Insurance—Voyage Policy—Deviation.*—A policy of marine assurance was on four pumps from A. to a steamer ashore while engaged at the wreck, and until returned to A.: owing to bad weather the steamer on her return tried to make for B., and in so doing foundered: *Held* that the assured could not recover.—*Wingate v. Foster*, L.R. 3 Q.B.D. 582; 47 L.J. Q.B. 525.
- (xiv.) **C. A.**—*Limitation of Liability—Gross Tonnage—Foreign Ship—30 & 31 Vict., c. 124.*—In an action for limitation of liability by owners of a foreign ship: *Held* that they were not entitled to make a deduction for space appropriated to crew in estimating the gross tonnage, as the provisions of section 9 of Merchant Shipping Act, 1867, had not been complied with.—*The Franconia*, 39 L.T. 57.
- (xv.) **P. D. A. Div.**—*Mortgage—Arrest by Mortgagee.*—The duly-appointed managing owner of a ship chartered her for a voyage: the mortgagee of shares in the ship, after she was loaded, took possession of his shares and arrested the ship: on motion by the owners ship was ordered to be released.—*The Maxima*, 39 L.T. 112
- (xvi.) **Ch. Div. V. C. M.**—*Sale of Share in Ship—Jurisdiction—17 & 18 Vict., c. 104, ss. 62-64.*—A petition was presented for the sale of shares in a ship to a particular person, the petitioner being sole executor and general legatee of the registered owner, and the application being made within a year but more than four weeks after the transmission of the shares: *Held* that the Chancery Div. had jurisdiction, and that it was unnecessary to serve the Crown.—*Re The Santon*, 26 W.R. 810.

**Solicitor:—**

- (i.) **C. P. Div.**—*Change of Solicitor—Costs—Judicature Act, 1873, s. 25, sub-s. 11.*—The rule at law as well as in equity now is that an order for changing a solicitor shall be made without any provision as to the payment of the solicitor's costs.—*Grant v. Holland*, 47 L.J. C.P. 518.
- (ii.) **C. P. Div.**—*Costs—Charging Order—23 & 24 Vict., c. 127, s. 28.*—The motion for a charging order under 23 & 24 Vict., c. 127, s. 28, must be made before the judge who tried the cause.—*Higgs v. Schrader*, 26 W.R. 831.
- (iii.) **C. A.**—*Costs—Lien—Fund Preserved.*—When a solicitor defended an action brought against a trustee of real estate, who was in possession, by a person claiming under a title adverse to trustee and *cestui-que* trust, he was *Held* entitled to a lien on the whole of the property preserved.—*Bulley v. Bulley*, L.R. 8 Ch. D. 479.
- (iv.) **Ch. Div. M. R.**—*Costs—Taxation—One Transaction.*—Where solicitors who were employed in a bankruptcy sent in their bill of costs, down to a certain day before the whole estate was sold, and after the sale of the estate they sent in another bill of costs: *Held* on summons to tax both bills, that they could not be treated as forming one bill, and that more than six months having elapsed since the delivery of the first bill, it could not be taxed.—*Re Hall and Barker*, 47 L.J. 621.
- (v.) **Q. B. Div.**—*Costs—Taxation—6 & 7 Vict., c. 73, ss. 37, 38.*—Bankruptcy proceedings having been instituted against D., he agreed with the solicitor of his chief creditor to pay him a lump sum for costs, if he would induce his client to allow D. to liquidate by arrangement: After his discharge, D. applied for an order to tax the solicitor's costs: the order was refused.—*Ex parte Docker, Re Heritage*, 47 L.J. Q.B. 509.

**South Africa, Law of:—**

- (i.) **P. C.**—*Grant in Erfpacht—Right to Minerals.*—Condition having been imposed on the holding of an estate granted on perpetual quit rent and recognised by the Crown, under which the government and the grantee



each took a half of the license monies for defraying the expenses of superintending diamond digging on the estate : *Held* that in the absence of evidence of mistake by its officers, the Crown could not impeach the grantee's title to minerals on the presumption arising from the form of the grant, that it created an *emphyteutic* tenure.—*Webb v. Gidley*, L.R. 3 App. 908 ; 38 L.T. 822.

#### Telegraph :—

- (i.) **C. A.**—*Compensation for Loss of Office—Travelling Allowance.*—31 & 32 Vict, c. 110, s. 8.—An officer of a telegraph company whose undertaking has been purchased by the Postmaster-General, under the Telegraph Act, 1868, is entitled to have his profit out of travelling allowance taken into consideration in estimating his "annual emolument" under s. 9 and s. 7 of that Act.—*Regina v. Postmaster-General*, L.R. 3 Q.B.D. 428.

#### Trade Mark :—

- (i.) **C. A.**—*Infringement—Musical Publication.*—Defendants were restrained from publishing a work edited by H., under the title of H.'s New Edition of Jousse's Royal Standard Pianoforte Tutor, as a fraudulent imitation of the title of a work of which plaintiffs were proprietors, called H.'s Royal Modern Tutor for the Pianoforte.—*Metzler v. Wood*, L.R. 8 Ch. D. 606 ; 47 L.J. Ch. 625.
- (ii.) **Ch. Div. V. C. M.**—*Infringement—Stamped Bottles.*—Where a trader sells a production in bottles or casks stamped indelibly with his known design, the Court will restrain another trader from selling a similar production in such bottles or casks, though he affix to them a label of his own.—*Rose v. Loftus*, 47 L.J. Ch. 576.
- (iii.) **C. A.**—*Infringement—Wharfinger's Lien.*—In an action to restrain infringement of trade mark, a wharfinger who had innocently received goods bearing the pirated mark was made a defendant, and in his defence submitted to act as the Court should direct on receiving his warehouse charges and costs : at the trial his counsel contended that plaintiff ought not to remove the trade marks till his charges were paid : *Held* that he was entitled to his costs from plaintiff, and had a lien on the goods for warehouse expenses superior to any lien of plaintiff for costs.—*Moet v. Pickering*, 38 L.T. 799.
- (iv.) **C. A.**—*Registration—Distinctiveness.*—In the absence of special circumstances the Court will not interfere with the decision of the Committee of Experts as to whether a cotton trade mark is or is not a trade mark within the Trade Marks Regulation Act, 1875.—*Re Orr, Ewing, & Co.'s Trade Marks*, L.R. 8 Ch. D. 794 ; 26 W.R. 777.
- (v.) **Ch. Div. V. C. H.**—*Registration—Distinctiveness—Representative Registration.*—Registration of cotton trade marks refused on the ground that they had been rejected by the Committee of Experts, and representative registration only accorded to others on the ground that the distinctive features only of a trade mark ought to be registered.—*Re Brook's Trade Marks*, 26 W.R. 791.
- (vi.) **Ch. Div. M. R.**—*Trade Name—Limited Company.*—A limited company having once obtained a registered name has the same rights as to trading under that name as an individual trading under his own name.—*Merchant Banking Co. v. Merchants' Joint Stock Bank*, 26 W.R. 847.

#### Trustee :—

- (i.) **Ch. Div. F. J.**—*Breach of Trust—Parties—Ord. 7, r. 2.*—Property was vested in three trustees on trusts, under which the income of £516 was payable to B. for life : one of the trustees paid B. the income during his life, and after his death the interest was paid by one of the trustee's executors with the knowledge of the other trustees, for some years : on

an action to recover the £516 and arrears of interest thereon against the trustee's executors: *Held*, under the circumstances, that the other trustees need not be made parties.—*Wilson v. Rhodes*, L.R. 8 Ch. D. 777.

- (ii.) **Ch. Div. V. C. H.**—*Breach of Trust—Investment—Liability of Co-Trustee.*—Trust to invest in Parliamentary stock or funds, or real securities, with power to sell and invest in any other funds or securities whatsoever: *Held* that the sale of consols and investment of proceeds in Russian Railway and Egyptian Bonds was authorised, but each of the trustees having retained possession of half of the bonds, and one having committed a breach of trust, the other was held liable.—*Lewis v. Nobbs*, L.R. 8 Ch. D. 591; 47 L.J. Ch. 662.
- (iii.) **C. A.**—*Investment—Real Securities.*—Under a trust to invest on "real securities," an investment on mortgage of leaseholds is improper.—*Jones v. Chennell*, L.R. 8 Ch. D. 492; 47 L.J. Ch. 588.
- (iv.) **Ch. Div. V. C. M.**—*Investment—22 & 23 Vict., c. 35, s. 32—23 & 24 Vict., c. 38, s. 11.*—Trustees of settlements coming within the operation of 23 & 24 Vict., c. 38, may invest in any securities in which cash under the control of the Court may be invested, though forbidden to do so by the settlement.—*Re Wedderburn's Trusts*, 47 L.J. Ch. 743; 38 L.T. 904.
- (v.) **H. L.**—*Power to Postpone Payment—Arrestment by Creditors.*—Gift of residue in trust for testator's children, the shares to vest on testator's death and be payable six months afterwards, with power to the trustees to postpone payment of any shares and apply income for benefit of the children or grandchildren, or to settle the shares for the benefit of such children or grandchildren and their issue as the trustees should consider expedient: the trustees paid to J., a son of testator, the income of his share for five years and part of the capital: judgment creditors of J. used arrestment in the hands of the trustees against the balance of J.'s share: *Held* that the trustees were entitled to execute a deed restricting the right of J. to a life interest rent and settling the fee on his children, and by another deed to resolve to apply the interest on J.'s behalf as an alimentary fund.—*Chambers v. Smith*, L.R. 3 App. 795.

#### University:—

- (i.) **C. A.**—*Religious Test—34 Vict., c. 26—37 & 38 Vict., c. 55.*—A fellowship of Hertford College restricted by the indowment to members of certain churches having become vacant, T. not being a member of one of the churches, applied to be examined as a candidate, and the governing body did not refuse to examine him, but told him that he would not in any event be elected: T. did not present himself at the examination and a qualified person was duly elected: *Held* that a mandamus ought not to issue to compel the college to examine T. and proceed to an election.—*Regina v. Hertford College*, 39 L.T. 18.

#### Vendor and Purchaser:—

- (i.) **Ch. Div. V. C. H.**—*Conditions of Sale—Rescission Clause—Absence of Title.*—A condition that if purchaser shall make any requisition or objection which vendor shall be unwilling to comply with, vendor may annul the sale, does not enable him to rescind the contract where he fails to show any title —*Bowman v. Hyland*, L.R. 8 Ch. D. 588; 47 L.J. Ch. 581; 39 L.T. 90; 26 W.R. 877.
- (ii.) **C. A.**—*Specific Performance.*—Defendant offered to sell to plaintiff an estate for a certain sum, which plaintiff accepted, subject to the title being approved by his solicitor, and afterwards a verbal arrangement was made that the purchase-money was to be paid by instalments which arrangement never resulted in any binding agreement: *Held* that there was originally no binding contract, as the approval of the title by purchaser's solicitors was an additional term not accepted by defendant.—*Hussey v. Payne*, L.R. 8 Ch. D. 670; 47 L.J. Ch. 751.



- (iii.) **Ch. Div. F. J.**—*Specific Performance with Variation*.—In an action by a purchaser for specific performance of a contract to sell, a contract signed by purchaser contained a reservation of mines, but the receipt for deposit was silent as to the reservation: Specific performance decreed with such reservation.—*Smith v. Wheatcroft*, 47 L.J. Ch. 745; 39 L.T. 103.
- (iv.) **C. A.**—*Statute of Frauds—Acceptance*.—Plaintiff verbally sold defendant six bales of wool which were sent to defendant by rail and unpacked by him, and on same day he wrote to plaintiff that two bales were inferior to sample, adding, "Please say what is to be done in the matter." Plaintiff replied denying that the bales were inferior to sample, and two days afterwards defendant sent back the goods: *Held*, on action for price of goods that there was no sufficient acceptance by defendant within s. 17 of Statute of Frauds.—*Rickard v. Moore*, 38 L.T. 841.
- (v.) **Ch. Div. V. C. H.**—*Statute of Frauds—Auction*.—At a sale by auction the auctioneer entered in the sale book the names of the vendor and purchaser, and the property sold, and the amount of the purchase-money, but made no reference to the conditions of sale: *Held* no sufficient contract in writing within the Statute of Frauds.—*Rishton v. Whatmore*, 47 L.J. Ch. 629; 26 W.R. 827.
- (vi.) **C. A.**—*Statute of Frauds—Conditional Acceptance*.—Where an offer in writing is accepted in writing, the reference in the acceptance to the preparation of a more formal contract does not amount to the introduction of a new term.—*Bonnewell v. Jenkins*, 47 L.J. Ch. 758.
- (vii.) **H. L.**—*Statute of Frauds—Description of Vendor*.—M. made a verbal offer to the agent of vendors of property sold subject to a condition that each purchaser should sign a contract, to purchase certain lots, and the agent afterwards wrote to M. that the proprietors accepted his offer which letter M. acknowledged in writing: *Held* a binding contract.—*Rossiter v. Miller*, 26 W.R. 865.

#### Will:—

- (i.) **C. A.**—*Accumulation*—39 & 40 Geo. 3, c. 98.—Bequest of fund on trust on second marriage of testator's widow to pay her an annuity and accumulate surplus income, and after her death the fund and accumulations to go to A.: The widow lived for more than twenty-one years after her second marriage: *Held* that the surplus income after twenty-one years was undisposed of.—*Weatherall v. Thornburgh*, 47 L.J. Ch. 658; 39 L.T. 9.
- (ii.) **C. A.**—*Annuity—Alienation—Forfeiture—Bankruptcy*.—Devise of realty charged with annuity in favour of A., but if he should do or permit anything whereby it should be aliened, then it should cease: A. failed to comply with a debtor's summons and was adjudicated bankrupt: *Held* that the annuity ceased.—*Ex parte Eyston, Re Throckmorton*, 47 L.J. Ch. 62.
- (iii.) **Ch. Div. V. C. H.**—*Annuity—Deficiency of Income—Arrears out of Corpus*.—Testator directed his trustees to sell his real and personal estate, and set apart a sufficient portion of the invested proceeds to produce an income of £1,200, which he bequeathed to his wife for life: the income of the whole estate proved insufficient to pay the £1,200: *Held* that the widow was not entitled to have the deficiency out of corpus.—*Gee v. Mahood*, 47 L.J. Ch. 641; 39 L.T. 90; 26 W.R. 789.
- (iv.) **C. A.**—*Charitable Bequest—Railway Debenture Stock*—9 Geo. 2, c. 36, s. 2.—Railway debenture stock regulated by the Companies Clauses Act, 1863, is not an interest in land within the Mortmain Act.—*Attree v. Hawe*, 26 W.R. 871.

- (v.) **Ch. Div. V. C. M.**—*Charitable Bequest—Partnership Property*—9 Gen. 2, c. 36.—The proceeds of sale of real estate, part of testator's partnership property directed by him to be sold, are an interest in land within the Mortmain Act.—*Ashworth v. Munn*, 47 L.J. Ch. 747.
- (vi.) **Ch. Div. V. C. M.**—*Codicil—Partial Revocation*.—Bequest of personalty to be laid out in the purchase of land to be settled to the uses in the will declared of testator's D. estates: by a subsequent codicil testator revoked the uses by the will declared of the D. estates, and declared new uses: *Held* that the codicil did not affect the bequest of personalty.—*Bridges v. Strachan*, L.R. 8 Ch. D. 558.
- (vii.) **H. L.**—*Construction—Annuity—Arrears—Express Trust*—3 & 4 Will. 4, c. 27, s. 25.—Testator gave an estate to his wife for life, and left all his property real and personal not otherwise specifically devised to trustees upon trust to pay his wife an annuity out of the profits of his business carried on by his sons in trust for his wife and children, and the profits arising from all his estate and property, and after death of wife the estate was to go to the eldest son only on condition of paying the several legacies directed, and discharging with fidelity the different trusts therein committed to him, and the three sons were made residuary legatees on paying and discharging the different legacies and trusts in the will: *Held* that there was no express trust imposed upon the estate for the payment of the annuity within section 25 of 3 & 4 Will. 4, c. 27.—*Cunningham v. Foot*, 38 L.T. 889; 26 W.R. 858.
- (viii.) **Ch. Div. M. R.**—*Construction—Annuity—Charge on Corpus*.—Testator, after bequeathing life annuities, bequeathed his general personal estate to trustees upon trust, out of the income thereof to pay and keep down the annuities, and "subject thereto" on trusts for his children: *Held* that the annuities were chargeable on the corpus.—*Mason v. Robinson*, 47 L.J. Ch. 660.
- (ix.) **Ch. Div. V. C. H.**—*Construction—Charitable Gift—Uncertainty—Legacy Duty*.—Direction to executors to apply to any charitable or benevolent purposes they might agree upon, and at any time the residue of personalty legally applicable to charitable purposes. The executors agreed in writing that the residue should be paid to a certain charitable institution: *Held* that the gift failed and that the next-of-kin were entitled. Testator gave charitable legacies out of pure personalty and directed the duties on all legacies to be paid out of residue in exoneration of the legacies: *Held* that the charitable legacies were exonerated only in the proportion which the residue consisted of pure personalty.—*Re Jarman's Estate, Leavers v. Clayton*, L.R. 8 Ch. D. 584; 47 L.J. Ch. 675; 29 L.T. 89; 26 W.R. 907.
- (x.) **Ch. Div. V. C. H.**—*Construction—Charitable Gift—Exoneration—Banker's Lien*.—Testator, after certain specific bequests, gave to a charity all such parts of his estate as were legally applicable for charitable purposes and not already disposed of exonerating such part of his estate from the payment of debts which he charged exclusively on his residuary estate which he gave in trust to pay debts, including debts secured on devised estates, in exoneration of such estates: the residuary estate being insufficient to pay debts: *Held* that the legacy of the charity was specific, and must contribute rateably with other specific gifts to the payment of the debts. Testator died indebted to his bankers in a sum secured by mortgage of a devised estate: and having a smaller sum to his credit on current account at the bank: *Held* that the balance on the current account was included in the charitable gift.—*Halse v. Rumsford*, 47 L.J. Ch. 559.
- (xi.) **Ch. Div. F. J.**—*Construction—Codicils—Partial Revocation—Acceleration*.—Testatrix gave a share of residuary real estate devised for sale and personalty to E. for life, remainder to E.'s children: by a codicil

referring to the will by date she revoked the gift in favour of E. and otherwise confirmed her will : by a second codicil, referring to the will and not referring to the first codicil, she devised real estate acquired after the date of the will to trustees upon the trusts in her will contained concerning residuary real estate, and in other respects confirmed her will : *Held* that the second codicil did not revoke the first so as to restore E. to the position of legatee, and that the whole of the real estate went according to the will as modified by the first codicil : and that the interests of E.'s children were accelerated, and till she had a child the income of the share would, so far as it came from realty, go to the trustee, and so far as from personalty to the next-of-kin.—*Green v. Tribe*, 38 L.T. 914.

- (xii.) **Ch. Div. V. C. H.**—*Construction—Conditional Bequest.*—Testatrix by her will, gave a legacy to B., provided that B. remained in her service : in June, 1876, she became insane, and B., who was entitled to three months notice, was dismissed by a person without authority, and against B.'s wish : in July, 1876, testatrix was found a lunatic, and an order was made for the sale of her household furniture, and in the following December the lunatic died : *Held* that B.'s legacy failed.—*In re Hartley's Trusts*, 47 L.J. Ch. 610.
- (xiii.) **Q. B. Div. Ireland.**—*Construction—Condition Precedent—Mixed Fund.*—Gift of real and personal property to testator's wife, on the condition that she should retire immediately after testator's death into a convent : *Held* a good condition precedent, and in default of compliance that the real estate went to the heir-at-law of testator.—*Duddy v. Gresham*, 39 L.T. 48.
- (xiv.) **C. A.**—*Construction—Equitable Estate.*—Testator, who died in 1828, gave real estate to trustees in fee upon trust for sole benefit of his two daughters, with direction that if either should die and leave no child, part of the estate should be sold and proceeds divided as mentioned : but that if either should leave children her share should go to such children after her death : neither of the daughters had children : *Held* that they took as joint tenants in fee.—*Yarrow v. Knightley*, L.R. 8 Ch. D. 736.
- (xv.) **C. A.**—*Construction—Falsa Demonstratio.*—Devise of lands at or within D. and at S. then in the occupation of G. : *Held* to include a small part of a farm without the parish of D. but adjoining to the rest of the farm which was in the parish, but not to include land at S. which was not in the occupation of G.—*Homer v. Homer*, L.R. 8 Ch. D. 758 ; 47 L.J. Ch. 635 ; 39 L.T. 3.
- (xvi.) **Ch. Div. V. C. B.**—*Construction—Falsa Demonstratio.*—Testator gave a legacy of his 7,000 dollars or the produce thereof : he was possessed at the date of the will and his death of 6,800 dollars U.S. bonds : *Held* that the gift was specific and was represented by the bonds.—*Palin v. Brookes*, 26 W.R. 877.
- (xvii.) **Ch. Div. V. C. H.**—*Construction—Gift of Income—Gift of Corpus.*—Testator by his will gave a daughter on her marriage the income of a specific sum of stock, and out of his general dividends the annual income of about £19<sup>1</sup>/<sub>2</sub>, making in all £400 per annum, and he directed that the income of the property settled on his other daughters on their marriages should be increased out of his general dividends to £400 annually to each : *Held* that the provisions amounted to gifts of the corpus sufficient to produce the incomes indicated.—*Englehardt v. Englehardt*, 26 W.R. 853.
- (xviii.) **C. P. Div.**—*Construction—Gift of Personal Estate and Property—Real Estate.*—Testator gave and bequeathed to his wife his household goods and all other his personal estate, property, chattels and effects whatever and wheresoever of which he was then seized, possessed, or entitled to or might thereafter acquire, to hold same unto his wife, her executors,

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- (xxii.) **Ch. Div. V. C. B.**—*Construction—Intestacy.*—Testator devised and bequeathed to R. and P. each a moiety of the interest and rents of his real and personal property, and directed that on the death of the survivor, all his property should be sold and the proceeds divided among his then surviving nephews and nieces: R. and P. both survived the testator: *Held*, on the death of P., that there was an intestacy of the income of a moiety till the death of R.—*Round v. Pickett*, 47 L.J. Ch. 631.
- (xxiii.) **Ch. Div. V. C. H.**—*Construction—"Issue" read "Children."*—Gift of a fund in trust for the lawful issue of F. surviving him equally to be divided between them, if more than one child share and share alike, and if but one, then for such only child, with a gift over in default of issue of the said F. becoming entitled: *Held* that issue must be restricted to children of F.—*Re Hopkin's Trusts*, 47 L.J. Ch. 672.
- (xxiv.) **P. D. A. Div.**—*Construction—Legal Heirs.*—Testator gave to H. the income of his estate and effects and the use of his furniture, adding, "the whole after her decease goes to my legal heirs and theirs for ever:" *Held* that the heir-at-law took personalty as well as realty.—*In the goods of Dixon*, 47 L.J. P.D.A. 57; *Todhunter v. Thompson*, 26 W.R. 883.
- (xxv.) **Ch. Div. V. C. M.**—*Construction—Life Interest—Repugnancy.*—Testator gave all his personal property, including farming implements and stock, to his widow for life, with a declaration that she should not be accountable for any diminution or depreciation to the farming stock and implements: *Held* an absolute gift of the stock and implements.—*Breton v. Mockett*, 47 L.J. Ch. 754; 26 W.R. 850.
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# Quarterly Digest

OF

## ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter.

By HENRY M. KEARY, of Lincoln's Inn, Barrister-at-Law.

FOR NOVEMBER, DECEMBER, 1878, AND JANUARY, 1879.

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### Administration:—

- (ix.) **Ch. Div. V. C. M.**—*Costs—Fund Provided by Testator—Lapsed Share.*—Testator devised his real estate to a brother who predeceased him, and bequeathed his personal estate on trusts after payment of debts, funeral, and testamentary expenses, for his nephews and nieces: *Held* that the expenses of administration must fall on the personalty.—*Jones v. Caless*, L.R. 10 Ch. D. 40; 39 L.T. 287; 27 W.R. 108.
- (x.) **Ch. Div. V. C. H.**—*Legacy to Bankrupt Debtor—Set Off—Retainer.*—A week before the death of testatrix a debtor to her, who was a legatee under her will, became bankrupt. The debt was never proved, nor was any dividend declared in the bankruptcy: *Held* that the testatrix's executors were not entitled to set off or retain the amount of the debt against the legacy, nor any amount in respect of dividend on the debt.—*Hodgson v. Fox*, L.R. 9 Ch. D. 673; 48 L.J. Ch. 52; 27 W.R. 38.
- (xi.) **C. A.**—*Mortgage Debt—Exoneration—17 & 18 Vict., c. 113; 30 & 31 Vict., c. 69.*—A charge of just debts on part of testator's real estates in exoneration of the rest is not sufficient expression of contrary intention to avoid the operation of Locke King's Act. The Act applies to a mortgaged estate, different portions of which are devised to different persons.—*Newmarch v. Storr*, L.R. 9 Ch. D. 12; 48 L.J. Ch. 28; 39 L.T. 146; 27 W.R. 104.
- (xii.) **Ch. Div. V. C. H.**—*Scotch Assets—General Administration.*—The Probate Div. having granted general probate of the will of a Scotch testator, the Ch. Div. made the ordinary decree for administration of the personal estate, without limiting it to English assets.—*Stirling-Maxwell v. Cartwright*, L.R. 9 Ch. D. 173; 47 L.J. Ch. 845.

### Agreements and Contracts:—

- (v.) **H. L.**—*Building Contract—Extra work—Certificate.*—A contract for the construction of buildings for a lump sum, provided that no alterations should be made without a written order from the employer's engineer:

the contractors, finding it impossible to make girders of a certain nature specified in the contract, were allowed to make them of a greater weight, and the weights were entered in the engineers' certificates: *Held* that these were not written orders; and that the contractors were not entitled to any extra payment in consequence of the increased weight of the girders.—*Tharsis Sulphur Co. v. McElroy*, L.R. 3 App. 1040.

- (vi.) **C. P. Div.**—*Construction—Deficiency in Quantity of Spirits—Loss of Alcoholic Strength.*—A dock company agreed that they would be answerable for deficiencies in quantity in wines and spirits stored by them beyond a certain amount: *Held* that they were not, under the agreement, liable for a diminution of the alcoholic strength of brandy; but that if such diminution was caused by their negligence, they were liable apart from the contract.—*Lamare v. St. Katherine's Dock Co.*, 39 L.T. 330.
- (vii.) **C. A.**—*Construction—To make as soon as possible—Special Purpose—Damages.*—Defendant knowing that plaintiffs had agreed with J. to make a machine within two months, agreed with plaintiffs to make a part of it as soon as possible. Defendant did not make the part until after the expiration of the two months, and J. refused to accept the machine: *Held* that defendant was bound to perform his contract within a reasonable time to be measured by what would with most manufacturers be regarded as such, and that he was liable for the damages to plaintiff resulting from the breach of contract with J.—*Hydraulic Engineering Co. v. McHaffie*, 27 W.R. 221.
- (viii.) **C. P. Div.**—*Contract by Letters—Statute of Frauds.*—Where it appeared from the correspondence between the parties that some of the terms of an agreement which required to be in writing had been arrived at, but the letter containing the agreement contained a statement that the writer had many other observations to make, and that they could afterwards talk the matter over, and then put the whole on stamped paper: *Held* that there was no contract between the parties.—*Bertel v. Neveux*, 39 L.T. 257.
- (ix.) **C. A.**—*Contract Induced by Fraud—Property in Goods—Bills of Lading.*—The agent of L. was induced by fraud to enter into contracts for the sale of wine to three persons, and he gave them the bills of lading of the wine, which was deposited with a dock company. The wine was then pledged to the plaintiffs to secure advances, who received the dock warrants issued by the company: *Held* that the plaintiffs had a lien on the wine for the money advanced by them as against L.—*Attenborough v. St. Katherine's Dock Co.*, L.R. 3 C.P.D. 450.
- (x.) **Q. B. Div.**—*Contract induced by Fraud—False Pretences—Innocent Purchaser—24 & 25 Vict., c. 96, s. 100.*—Plaintiff bought sheep from W., who obtained them from defendant for a cheque on a bank where he had no account: *Held* that the property in the sheep having passed to plaintiff before defendant had avoided the contract, the provision for restitution upon conviction in sec. 100 of 24 & 25 Vict., c. 96, did not apply.—*Moyce v. Newington*, 39 L.T. 535.
- (xi.) **C. P. Div.**—*Infant Promise of Marriage—Ratification—37 & 38 Vict., c. 62, s. 2.*—No action can be brought for breach of promise of marriage made during infancy, notwithstanding a ratification having been made after full age.—*Coxhead v. Mullis*, 47 L.J. C.P. 761; 39 L.T. 349; 27 W.R. 136.
- (xii.) **C. A.**—*Informal Agreement—Condition Precedent.*—A builder sent in a tender, to which plaintiff's agent replied by letter, accepting and adding, "The contract will be prepared by Messrs. A. and C.:" *Held* a binding contract.—*Lewis v. Brass*, L.R. 3 Q.B.D., 667.

- (xiii.) **C. A.**—*Stockbroker—Contract to Pay Differences—Gaming—8 & 9 Vict., c. 109, s. 18.*—Defendant employed plaintiff to speculate for him on the Stock Exchange, it being understood between them that defendant, so long as the arrangement lasted, should only be liable to pay or receive differences: in an action by plaintiff for commission and indemnity against liabilities incurred on the Stock Exchange for benefit of defendant, defendant pleaded that the claim was illegal, as founded on gaming and wagering: *Held* that plaintiff was entitled to recover.—*Thacker v. Hardy*, 27 W.R. 158.
- (xiv.) **C. P. Div.**—*Wrongful Conversion—Delivery to order of third party—Measure of Damages.*—Plaintiffs employed L. to make waggons according to sample at a fixed price; and L. employed a waggon company to make them at a lower price; and afterwards it was arranged that plaintiff should pay the company direct. The waggon company delivered waggons to a railway company to order of plaintiff, and plaintiff sent a complaint to the waggon company and L. that they were not equal to sample, and stated that they would sell them and hold L. responsible for loss: L. rejected the waggons, and plaintiffs gave the railway company notice not to deliver the waggons without their order, but the railway company delivered them to the waggon company, who refused to give them up: in an action for wrongful conversion, *Held* that both companies were liable, and that plaintiffs were entitled to recover the full value of the goods at the time of conversion.—*Johnson v. Lancashire and Yorkshire Railway Co.*, L.R. 3 C.P.D. 499; 39 L.T. 448.

**Banker:—**

- (ii.) **Ch. Div. V. C. B.**—*Surety—Current Account—Appropriation.*—Bankers advanced money to C., and took as security a series of promissory notes, maturing at the rate of one a week for ten weeks, and W. as surety for C. gave a written undertaking that if the promissory notes were not paid he would secure the debt by a mortgage. Moneys were paid by C. into the bank more than sufficient to meet the notes, but C. also drew on the bank so that at the maturity of some of the bills his account was overdrawn: *Held* that the bankers were bound to apply moneys received after each note became payable primarily towards the payment of such note, and as they had not done so W. was discharged from his suretyship.—*Kinnaird v. Webster*, 39 L.T. 494; 27 W.R. 212.

**Bankruptcy:—**

- (xxxii.) **C. A.**—*Act of Bankruptcy—Adjudication—Holder of Bill of Sale—32 & 33 Vict., c. 71, ss. 10, 11.*—An adjudication of bankruptcy is conclusive as against the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy, on which the adjudication is founded, was in fact committed; but the holder of the bill may appeal from the adjudication.—*Ex parte Learoyd, Re Faulds*, L.R. 10 Ch. D. 3; 39 L.T. 525.
- (xxxiii.) **C. A.**—*Act of Bankruptcy—Bill of Sale—Forbearance to Enforce Judgment.*—The forbearance of a creditor to enforce a judgment for a sum exceeding £50 against a trader is not such an equivalent for an assignment by the trader of the whole of his property, to secure a past debt, as to prevent it being an act of bankruptcy.—*Ex parte Cooper, Re Baum* (2), 39 L.T. 523.
- (xxxiv.) **C. J. B.**—*Act of Bankruptcy—Bill of Sale—Substantial Further Advance.*—A shoemaker executed a bill of sale to a creditor on all his property, except book debts, to secure a past debt of £227 and a fresh advance of £15: *Held* that the £15 was a substantial further advance.—*Ex parte Evans, Re Edwards*, 39 L.T. 364.
- (xxxv.) **C. J. B.**—*Appeal—Notice.*—An appeal was entered with Registrar of Appeals within 21 days from date of order, but a copy of appeal notice

was not sent to Registrar of the Court appealed from till two months afterwards: *Held* that the appeal could not be heard.—*Ex parte Sillence, Re Sillence*, 47 L.J. Bcy. 87.

- (xxxvi.) C. J. B.—*Appeal—Person Aggrieved—Petitioning Creditor's Debt.*—The trustee of a creditor's deed, on which an adjudication is founded, is entitled to appeal. A claim by a writ served at date of act of bankruptcy for a sum less than £50 and for costs, which, when ascertained, brought up the total to over £50, is not a good petitioning creditor's debt.—*Ex parte Sadler, Re Whelan*, 39 L.T. 361; 27 W.R. 156.
- (xxxvii.) C. A.—*Appeal—Security for Costs—Ord. 58, r. 15.*—The Court of Appeal can, notwithstanding Bankruptcy Rules 1870, r. 145, require such security as it thinks fit to be given for the costs of a bankruptcy appeal.—*Ex parte Isaacs, Re Baum*, L.R. 9 Ch. D. 271; 47 L.J. Bcy. 111; 38 L.T. 924; 26 W.R. 890.
- (xxxviii.) C. A.—*Appeal—Security for Costs—Default—Motion to Dismiss.*—An appellant having been ordered to give security for costs of appeal, and not having done so, respondents gave notice of motion to dismiss appeal for want of prosecution. Before the motion came on the appellants gave the security: *Held* that appellants must pay costs of motion before appeal could be heard.—*Ex parte Isaacs, Re Baum* (2), L.R. 10 Ch. D. 1; 39 L.T. 520.
- (xxxix.) C. J. B.—*Composition—Debtor's Statement—Rescinding Resolutions—32 & 33 Vict., c. 62, s. 11.*—The Court will not rescind the registration of resolutions for composition on the ground of mis-statements of assets by debtor in the absence of sufficient evidence to convict him of misdemeanour under sec. 11, sub-sec. 6 of the Debtor's Act, 1869.—*Ex parte Hart, Re Law*, 47 L.J. Bcy. 88.
- (xl.) C. J. B.—*Discharge—Discretion of Court—Bankruptcy Act, 1869, s. 48.*—The Court has no discretion to refuse an order of discharge to a bankrupt, except in some one of the cases mentioned in section 48 of the Bankruptcy Act.—*Ex parte Hamilton, Re Hamilton*, L.R. 9 Ch. D. 694.
- (xli.) C. A.—*Discharge—Bankrupt—Taxation—Party Interested—6 & 7 Vict., c. 78.*—Decision of V.C.B. (see Bankruptcy viii., p. 4) affirmed.—*Re Lead-bitter and Harvey*, 39 L.T. 286.
- (xlii.) C. J. B.—*Equitable Assignment—Direction to Pay.*—A. authorised his tenant in writing when the Michaelmas rent should become due, to pay B. £200: before Michaelmas A. became bankrupt: *Held* that the trustee in bankruptcy was entitled to the rent in preference to B.—*Ex parte Rowell, Re Whitting*, 39 L.T. 259; 27 W.R. 64.
- (xliii.) C. A.—*Hire of Chattels—Disclaimer—Leasehold Interest—Bankruptcy Rules, 1871, r. 28.*—A hiring of chattels for a term of years is not a leasehold interest within Rule 28 of Bankruptcy Rules, 1871.—*Sheffield Waggon Co. v. Stratton*, 48 L.J. Q.B. 35; 27 W.R. 120.
- (xliv.) C. A.—*Leaseholds—Disclaimer—Fixtures.*—Decision of C. J. B. (see Bankruptcy, xiv., p. 4) reversed.—*Ex parte Brook, Re Roberts*, 39 L.T. 458; 27 W.R. 255.
- (xlv.) C. A.—*Leaseholds—Omission to Disclaim—Trustee's Liability.*—A trustee in bankruptcy, who takes possession of leasehold property of bankrupt, and does not disclaim after notice from landlord, is personally liable for rent accruing due after he takes possession.—*Ex parte Dressler, Re Soloman*, L.R. 9 Ch. D. 252; 39 L.T. 377; 27 W.R. 144.
- (xlvi.) C. A.—*Liquidation—Apparent Possession—Discharge.*—Where a debtor, permitted by the trustee to retain possession of his furniture, holds himself out as the owner thereof, the trustee not having notice, does not

thereby forfeit his right to it: a discharge by joint creditors does not discharge the debtor from separate debts.—*Meggy v. Imperial Discount Co.*, L.R. 3 Q.B.D. 711; 48 L.J. Q.B. 54.

- (xlvii.) **Ex. Div.**—*Liquidation—Discharge—Subsequent Promise to Pay Previous Debt.*—A promise, made by a liquidating debtor after discharge, to pay debts incurred previously to liquidation is binding on him, if new and valuable consideration is given for the promise.—*Jakeman v. Cook*, L.R. 4 Ex. D. 26; 27 W.R. 171.
- (xlviii.) **C. A.**—*Liquidation—Misdescription in Petition—Leave to Amend.*—A debtor described himself in his liquidation petition by his business address, and omitted mention of his private address: *Held* a substantial misdescription; registration of resolutions and leave to amend refused.—*Ex parte Jerningham, Re Jerningham*, L.R. 9 Ch. D. 466; 47 L.J. Bcy. 115; 39 L.T. 186; 27 W.R. 157.
- (xlix.) **C. J. B.**—*Liquidation—Purchase from Debtor—Description in Advertisement.*—The mere fact that a trustee has not taken possession of a debtor's property for two months after appointment, will not destroy his right to the property as against a *bonâ fide* purchaser from debtor: any objection to the description of the debtor in the advertisement must be taken before registration of creditors' resolutions.—*Ex parte Cooper, Re Green*, 89 L.T. 260.
- (i.) **C. A.**—*Liquidation—Small Assets—Discharge.*—The fact that a debtor's assets consist of litigated claims does not prevent his creditors from passing a resolution for liquidating by arrangement: delegation of the power of granting debtor's discharge is *ultra vires*.—*Ex parte Hope, Re Hope*, L.R. 9 Ch.D. 398; 47 L.J. Bcy. 116; 27 W.R. 7.
- (ii.) **C. J. B.**—*Order and Disposition—Share of Partnership.*—A., a partner, mortgaged his share in the partnership property and business to B.: the deed was not registered as a bill of sale, and the property remained in the occupation of the firm until the bankruptcy of A.: *Held* that A.'s interest in the partnership was a *chose in action* other than a debt within sec. 15, sub-sec. 5, of the Bankruptcy Act, 1869, and that the property comprised in the deed was not in the order and disposition of A. at the time of the bankruptcy.—*Ex parte Fletcher, In re Bainbridge*, 47 L.J. Bcy. 70.
- (lii.) **C. J. B.**—*Proof—Loan Society—Subsequent Interest.*—A loan society advanced £250 to B. on condition that he should pay back £550 by monthly instalments: after he had paid some instalments he filed a petition for liquidation: *Held* that the society was entitled to prove for the whole of the balance of the £550 remaining unpaid.—*Ex parte Cockburn, Re Lundy*, 39 L.T. 362.
- (liii.) **C. J. B.**—*Proof in respect of Stolen Goods—Compounding Felony.*—When bankrupt had absconded, and subsequently it was discovered by his employers that he had committed defalcations, but they did not issue a warrant against him till ten days afterwards; and he had not since been found: *Held* that the employers were entitled to prove in respect of the amount stolen.—*Ex parte Turquand, Re Shepherd*, L.R. 9 Ch. D. 704.
- (liv.) **C. A.**—*Secured Creditor—Garnishee Order Nisi.*—A judgment creditor who has obtained a garnishee order *nisi*, attaching debts due to the debtor, before he has filed a liquidation petition, is a secured creditor within sec. 16, sub-sec. 5, of the Bankruptcy Act, and his title to the debts will prevail against the trustee, though some of them were not payable till after the commencement of the liquidation.—*Ex parte Joselyne, Re Watt*, 47 L.J. Bcy. 91.
- (lv.) **C. A.**—*Substituted Service—Absconding Debtor—District Registry.*—The jurisdiction to make an order for substituted service under rule 61 of

Bankruptcy Rules, 1871, lies with the Court of the District in which the debtor's usual place of residence was previous to his absconding.—*Ex parte North Kent Bank, Re Holdsworth*, L.R. 9 Ch. D. 333; 39 L.T. 379; 27 W.R. 158.

- (lvi.) **C. A.**—*Undischarged Bankrupt—After-acquired Property.*—In an action by an undischarged bankrupt for work done by him for defendant after bankruptcy, it is no defence to plead that he is an undischarged bankrupt.—*James v. Brick & Stone Co.*, 27 W.R. 221.
- (lvii.) **C. A.**—*Undischarged Bankrupt—Damages in Action for Slander.*—Damages recovered by an undischarged bankrupt in an action of slander, do not form part of his property divisible among his creditors within s. 15, sub-s. 3, of the Bankruptcy Act, 1869.—*Ex parte Vine, In re Wilson*, 47 L.J. Boy. 116.

#### Bill of Sale :—

- (v.) **C. A.**—*Registration—Description of Grantor.*—In the affidavit filed with a copy of bill of sale the grantor was described as J. W. of L. Farm, in the County of C. The grantor's real name was J. W., but he was generally known by, and had assumed the name of, J. A. W. The farm was in the County of the City of C.: *Held* that the description was sufficient.—*Ex parte Hattie, Re Wood*, 39 L.T. 373.
- (vi.) **C. A.**—*Registration—Description of Witness.*—Decision of Q. B. Div. (see *Bill of Sale* iii., p. 7) affirmed.—*Blount v. Harris*, 39 L.T. 465; 27 W.R. 202.
- (vii.) **C. A.**—*Unregistered Bill—Mortgage by Partners—Assignment—Bankruptcy.*—Two partners in trade, A. and B., executed a mortgage of trade fixtures and chattels which was not registered as a bill of sale. Afterwards A. retired from the partnership, and assigned his share in the goods to B. subject to the mortgage. B. subsequently filed a liquidation petition: *Held* that the loose chattels passed to the trustee in bankruptcy, and as to the fixtures that the mortgage was void as against the trustee to the extent only of the debtor's original moiety.—*Ex parte Brown, Re Reed*, L.R. 9 Ch. D. 389; 39 L.T. 338; 27 W.R. 219.
- (viii.) **C. A.**—*Unregistered Bill—Sale of Furniture and Subsequent Letting.*—C. lent £150 to B, a trader, to pay out an execution, and B. gave him a receipt written at the foot of an inventory of furniture as a receipt for the money for an absolute sale of the furniture to C.; and on same day they executed a memorandum of agreement for C. to let to B. the furniture for two months for £170, in case of default by or bankruptcy of B., C. to seize the furniture and sell, if the £170 should be paid to C., then the furniture should belong to B.: *Held* that these two documents together constituted a bill of sale requiring registration, and that no difference in this respect was made by the fact of C. having been paid off by a third person who by a fresh agreement was put in the same position as C.—*Ex parte Odell, Re Walden*, 39 L.T. 333.
- (ix.) **C. A.**—*Unregistered Bill—Sale of Furniture and Subsequent Letting.*—A trader sold furniture in his house to J., and at the foot of an inventory of the furniture signed a receipt for the money as purchase-money of the goods inventoried, and on same day delivered a chair to J. in the name of the furniture: J. verbally agreed to let the furniture to the trader, and it remained in his possession: *Held* that the inventory and receipt constituted a bill of sale, which, being unregistered, was void against the trader's trustee in liquidation.—*Ex parte Cooper, Re Baum* (1), 39 L.T. 521.

#### Building Society :—

- (i.) **Ch. Div. V. C. B.**—*Mortgage—Fines.*—Fines imposed by the rules of a benefit building society and covenanted to be paid in a mortgage deed by a member, are part of the principal money secured by the mortgage,



and where an account is decreed, are included under the term "principal interest and costs."—*Provident Permanent Building Society v. Greenhill*, L.R. 9 Ch. D. 122; 27 W.R. 110.

**Burial Ground:—**

- (i.) **C. A.**—*Burial Fees—Cemetery Act—New Ecclesiastical District.*—By a private Act for establishing a cemetery, it was provided that certain fees should be paid by the Cemetery Company to the Incumbent of the parish or ecclesiastical district from which any body should be removed for burial in the cemetery, and that a part of these fees should be handed over to the churchwardens to be applied among the persons entitled to share the burial fees in such parishes or districts: before the cemetery was made, the parish churchyard of C. was used as burial place for persons dying in the parish, and the Vicar of C. was entitled to the fees: after the Act, three separate ecclesiastical districts were formed out of the parish: *Held* that the incumbents of the three districts were entitled to the fees under the Act as against the Vicar.—*Bowyer v. Stantial*, L.R. 3 Ex. D. 315.

**Canada, Law of:—**

- (iii.) **P. C.**—*Expropriation—Apportionment of Indemnity.*—The commissioners appointed under Colonial Act, 27 & 28 Vict., c. 60, must under Colonial Act, 29 & 30 Vict., c. 56, s. 12, assess and appropriate the indemnity for expropriated land among the persons benefited by the improvement, at the same time that they determine the amount of the indemnity, and not after their report has been homologated.—*Mayor of Montreal v. Stephens*, 47 L.J. P.C. 67.

**Common:—**

- (ii.) **C. A.**—*Right of Fold-course—Finding on issues in previous suit—Estoppel.*—In an action to restrain the inclosure of part of waste lands by the lord of the manor in which the plaintiff claimed a liberty of freehold fold-course over the lands in question, it appeared that in a previous action between the parties' predecessors in title issues had been directed as to the right of common claimed by plaintiff's predecessor in the lands, whether he was entitled to any and what liberty of fold-course; and the finding thereon was that he was entitled to the liberty of two several fold-courses in the land: *Held* that this finding did not estoppel defendants from denying that plaintiff had a right over the land other than a right of common.—*Robinson v. Duleep Singh*, 39 L.T. 313; 27 W.R. 21.

**Company:—**

- (xxii.) **C. A.**—*Debenture—Charge on Estate Property and Effects.*—Directors of a company, with an office in London, and incorporated for the purpose of acquiring and dealing with land in Florence, were empowered by the articles to borrow money by mortgage of any of the company's property, or by bonds or debentures, entitling the holders to be paid out of the property and effects of the company: bonds were issued, purporting to bind the members of the company, and all their estate, property, and effects, to repay the money borrowed: *Held* that these bonds constituted a charge on the property of the company for the time being.—*Moor's Case, Re Florence Land, &c., Co.*, 27 W.R. 236.
- (xxiii.) **Ch. Div. V. C. B.**—*Director's Qualification—Resignation—Liability.*—A company's act provided that the qualification for directorship should be twenty shares, that P. and others should be first directors and continue in office till first ordinary meeting: no ordinary meeting was held within six months after the passing of the Act: P. resigned his office before the first ordinary meeting, and received a cheque as remuneration for his



services: subsequently he was entered on the register as the holder of twenty shares, and a call was made on him, which he refused to pay: *Held* that he was liable for the twenty shares.—*North and South Woolwich Subway Co. v. Pym*, 39 L.T. 346; 27 W.R. 259.

- (xxiv.) **Ch. Div. M. R.**—*Director's Qualification—Trust Shares—Injunction.*—The qualification for directorship of a company was the holding as registered member in his own right capital of at least £500 nominal value: *Held* that the registered owner of this amount, though he had transferred his shares to another, was eligible and entitled to an injunction against the other directors to restrain them from wrongfully excluding him from acting as director.—*Pulbrook v. Richmond Mining Co.*, L.R. 9 Ch.D. 610; 48 L.J. Ch. 65.
- (xxv.) **H. L.**—*Promoters—Concealment—Fiduciary Position.*—*Held* that where a syndicate had bought property, and afterwards sold it to a company formed under their auspices, they were placed in a fiduciary position with regard to the company, and were bound to disclose facts relating to the property likely to influence the company in considering the desirability of the purchase.—*Erlanger v. New Sombrero Phosphate Co.*, L.R. 3 App. 1218; 39 L.T. 269; 27 W.R. 65.
- (xxvi.) **Ch. Div. M. R.**—*Voluntary Society—Sale of Property.*—On the sale of land belonging to a voluntary society with no rules as to the disposition of its property: *Held* that the members of the society at the time were entitled to the proceeds in equal shares.—*Brown v. Dale*, L.R. 9 Ch. D. 78; 27 W.R. 149.
- (xxvii.) **Ch. Div. M. R.**—*Winding-up—Contributory—Directors—Ultra vires.*—*Held* that the directors of a company in liquidation were liable to pay to the official liquidator sums paid by them out of capital as dividends on the shares, though such payment had been sanctioned at a general meeting.—*Re National Funds Assurance Society*, 39 L.T. 420.
- (xxviii.) **Ch. Div. V. C. H.**—*Winding-up—Contributory—Paid-up Shares.*—A company agreed with W. for the issue of advertisements in his paper to be paid for in fully paid-up shares, and advertisements were accordingly inserted by W., and shares issued to him purporting to be paid-up: *Held* on the winding-up that W. was not liable to contribute in respect of such shares, and that he was entitled to prove for advertisements inserted subsequently, for which he had received no shares.—*White's Case, Re Government Fire Insurance Co.*, 39 L.T. 533.
- (xxix.) **Ch. Div. V. C. M.**—*Winding-up—Official Liquidator—Discharge.*—On the winding-up of an insolvent company, an accountant having been appointed official liquidator, he was discharged on the application of the unsecured creditors and two of the latter appointed to act as official liquidators, without remuneration.—*Re Association of Land Financiers*, 27 W.R. 224.
- (xxx.) **Ch. Div. V. C. M.**—*Winding-up—Petition—Life Insurance—Security for Costs—33 & 34 Vict., c. 61, s. 21.*—When a life insurance company has passed a resolution for voluntary winding-up, a policyholder may petition for a compulsory winding-up without a reference to Chambers, and without giving security for costs.—*Re British Alliance Assurance Corporation*, L.R. 9 Ch. D. 635.
- (xxxi.) **Ch. Div. V. C. M.**—*Winding-up—Petition of Debenture-holders—Incorporation by Statute.*—A company incorporated by Act of Parliament for public purposes cannot be wound-up on the petition of debenture-holders.—*Re Herne Bay Waterworks Co.*, L.R. 10 Ch. D. 42; 48 L.J. Ch. 69; 32 L.T. 324; 27 W.R. 36.
- (xxxii.) **Ch. Div. M. R.**—*Winding-up Voluntarily—Contributory—Set-off.*—Where a limited company is in voluntary liquidation, a contributory

cannot set-off a debt due from the company against calls made either before or after the resolution to wind-up.—*Re Whitehouse & Co.*, L.R. 9 Ch. D. 595; 47 L.J. Ch. 801; 39 L.T. 415; 27 W.R. 181.

- (xxxiii.) **C. A.**—*Winding-up Voluntarily—Fraud—Repudiation of Shares.*—The principle that a shareholder induced by fraud to take shares in a company, cannot repudiate them after the company has been ordered to be wound-up, if any debts of the company remain unpaid, extends to a voluntary winding-up without supervision.—*Stone v. City & County Bank*; *Collins v. Ditto*, 47 L.J. C.P. 681.

### Copyright:—

- (ii.) **Q. B. Div.**—*Music—Right to perform—Entry at Stationers' Hall*—5 & 6 Vict., c. 45, ss. 14, 20.—*Held* that section 20 of 5 & 6 Vict., c. 45, is not retrospective, but that assignees of the copyright of music published before the Act, had a right to move under section 14 to expunge an entry in the Stationers' Hall Registry of an invalid assignment by the composer of the right of public performance.—*Ex parte Hutchings*, 48 L.J. Q.B. 29; 39 L.T. 396; 27 W.R. 261.
- (iii.) **Ch. Div. V. C. M.**—*Title of Book—Registration*—5 & 6 Vict., c. 45.—The title of a book may be the subject of copyright, and such copyright will not be lost merely by the book being out of print for some time: the names of the first publisher and of the proprietor at the time of registration only need be registered.—*Weldon v. Dicks*, 39 L.T. 467.

### Crimes and Offences:—

- (v.) **Ex. Div.**—*Adulteration—Written Warranty*—38 & 39 Vict., c. 63, s. 25.—In order that a defendant in a prosecution under the Sale of Food and Drugs Act, 1875, may be entitled to be discharged under section 25, he must be provided with a written warranty in express terms, and not merely a document containing a description of the article purchased.—*Rook v. Hopley*, 47 L.J. M.C. 118.
- (vi.) **C. C. R.**—*Converting to own use—Agent receiving Money—Direction in Writing*—24 & 25 Vict., c. 96, s. 75.—Prisoner was employed to sell goods for prosecutor and to remit moneys received on sales to him, and the prosecutor writing to him in regard to certain sums due directed him to remit money received from customers to him on the same day that prisoner received it: subsequently prisoner received other sums of money and converted them to his own use: *Held* that he could not be convicted under sec. 75 of the Larceny Act.—*Regina v. Brownlow*, 39 L.T. 479.
- (vii.) **C. C. R.**—*Embezzlement—Venue.*—A commercial traveller, who lived at G., collected at N. money for his employers, which he did not remit nor account for, and a month afterwards one of the employers saw him at G. and taxed him with having done so, which he admitted: he was convicted at G. borough quarter sessions for embezzlement. *Held* that there was no evidence of embezzlement within the borough.—*Regina v. Treadgold*, 39 L.T. 291.
- (viii.) **Q. B. Div.**—*Extradition—Exemption*—33 & 34 Vict., c. 52.—By an arrangement, subsequent in date to the Extradition Act, with the Swiss Government, it was agreed that the respective subjects should not be mutually delivered, an order in council referring to this arrangement directed that the act should apply to Switzerland: *Held* that an Englishman accused of larceny in Switzerland could not be delivered up.—*Regina v. Wilson*, 48 L.J. M.C. 37.
- (ix.) **Ex. Div.**—*Extradition—Warrant—Description of Offence.*—A native of Switzerland was apprehended under the Extradition Act on a warrant charging him with crimes against the bankruptcy laws: *Held* a sufficient description of the offence to justify his apprehension and detention.—*Re Terraz*, 39 L.T. 502; 27 W.R. 170.

- (x.) **C. C. R.**—*Larceny—Recent Possession—Evidence for Jury.*—The owner of a bag left it near a place where the prisoner and two other persons were at the time : prisoner passed the place, and shortly afterwards the bag was missed : it was found afterwards in a hay-loft near a highway, to which any person could obtain access : *Held* that there was no evidence of recent possession to go to jury.—*Regina v. Hughes*, 39 L.T. 292.
- (xi.) **C. C. R.**—*Prize-Fight—Sparring with Gloves.*—On the trial of an indictment for assembling to witness a prize-fight, the chairman directed the jury that if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of law, and a prize-fight, whether they used gloves or not : *Held* a proper direction.—*Regina v. Orton*, 39 L.T. 293.
- (xii.) **C. P. Div.**—*Reward for Information Leading to Apprehension—Voluntary Surrender to Constable.*—When a reward is offered for information leading to the apprehension of a felon, a police-constable, to whom the felon has offered to surrender himself, is not entitled to the reward.—*Bent v. Wakefield & Barnsley Union Bank*, L.R. 4 C.P.D. 1 ; 27 W.R. 168.
- (xiii.) **Q. B. Div.**—*Trespass on Land—Fox-Hunting.*—A person is not justified in entering the land of another against his will for purpose of fox-hunting.—*Paul v. Summerhayes*, L.R. 4 Q.B.D. 9 ; 48 L.J. M.C. 33 ; 27 W.R. 215.

#### Debtor and Creditor :—

- (viii.) **C. A.**—*Acknowledgment of Debt—Statute of Limitations—9 Geo. IV., c. 14, s. 1.*—Decision of C.P.D. (see *Debtor and Creditor* i, p. 12) affirmed.—*Meyerhof v. Froelich*, 48 L.J. C.P. 43 ; 27 W.R. 258.
- (ix.) **Q. B. Div.**—*Attachment of Debt—Foreign Attachment—Lord Mayor's Court.*—The existence of an attachment in the Lord Mayor's Court does not prevent the operation of a garnishee order under the C. L. P. Act, 1854, ss. 60–64.—*Richter v. Laxton*, 39 L.T. 499 ; 27 W.R. 214.
- (x.) **C. P. Div.**—*Attachment of Debt—Partial Interest in Trust Fund.*—When plaintiff had recovered judgment against defendant, who was entitled to an annuity for the maintenance of herself and her infant son : *Held* that the annuity was attachable, subject to an inquiry as to proportion to be allowed for son's maintenance.—*Nash v. Pease*, 47 L.J. C.P. 766.
- (xi.) **Q. B. Div.**—*Execution—Fraudulent Conveyance—13 Eliz., c. 5.*—A trader, in insolvent circumstances, executed a deed conveying all his property to trustees on trust to pay dividends to assenting creditors, with the object of defeating executions which might prevent the equal distribution of his property : *Held* that the deed was fraudulent under 13 Eliz., c. 5, and void as against non-assenting judgment creditors.—*Spencer v. Slater*, L.R. 4 Q.B.D. 13 ; 39 L.T. 424 ; 27 W.R. 134.

#### Defamation :—

- (iii.) **C. A.**—*Libel—Felon—9 Geo. IV., c. 32, s. 3.*—It is libellous to apply the word felon to a man who has been convicted of felony and has undergone his sentence.—*Leyman v. Latimer*, L.R. 3 Ex. D. 352.
- (iv.) **Q. B. Div.**—*Libel—Newspaper—Liability of Proprietor—6 & 7 Vict., c. 96, s. 7.*—When on a prosecution for libel against the proprietor of a newspaper, he sets up a defence under sec. 7 of Lord Campbell's Act, it is the duty of the judge to direct the jury that a general authority, given by the proprietor to the editor to conduct the newspaper, must be taken to mean, in the absence of special circumstances, an authority to conduct it according to law.—*Regina v. Holbrook*, 39 L.T. 536.

**Easement :—**

- (v.) **Ch. Div. V. C. B.—Light and Air—Continuous and Apparent Easement.**—A vendor having conveyed part of his property to A., without any reservation, subsequently conveyed another part to B., on which was situated a building having three windows in a wall abutting upon A.'s part, which had been there before the conveyance to A., but were not ancient lights, nor was the right to light and air to them a necessity : *Held* that there was no implied reservation of such right out of the conveyance to A.—*Wheeldon v. Burrows*, 27 W.R. 165.

**Ecclesiastical Law :—**

- (ii.) **Q. B. Div.—Monition—Suspension—Prohibition—53 Geo. III., c. 127, s. 1.**—A clerk in orders who has, in a criminal suit, been admonished by the Court of Arches to abstain from illegal practices in the services of the Church cannot for subsequent disobedience be summarily suspended, and a prohibition will be granted to restrain execution of any such sentence.—*Martin v. Mackonochie*, L.R. 3 Q.B.D. 730.
- (iii.) **Ct. of Arches.—Monition—Suspension.**—On an application to enforce a monition in a case similar to the preceding one : *Held* that the judgment of the Q. B. Div. in that case must be followed.—*Combe v. Edwards*, L.R. 3 P.D. 103 ; 39 L.T. 295.

**Election :—**

- (i.) **C. P. Div.—Parliament—Borough Vote—Notice of Objection—Service—6 Vict., c. 18, s. 101.**—All parish business was transacted at the office of the collector of rates for the borough of B., who discharged all the ordinary duties of the overseers : *Held* that a notice of objection to appellant's name was properly served on the overseers by being left at the office.—*Green v. Mepham*, 39 L.T. 450.
- (ii.) **C. P. Div.—Parliament—Borough Vote—Rating of Owner by Agreement—32 & 33 Vict., c. 41, s. 19.**—Section 19 of the Poor Law Assessment Act, 1869, applies to the cases where the owner is by agreement with the occupier liable for the rates, and the name of the occupier has been omitted from the rate-book.—*Barton v. Birmingham Town Clerk*, 39 L.T. 352.
- (iii.) **C. P. Div.—Parliament—Borough Vote—Rating of Owner—Reduction of Rate—32 & 33 Vict., c. 41, s. 4.**—Where an owner paid rates, and such rates had been reduced under sec. 4, sub-sec. 2, of 32 & 33 Vict., c. 41 ; but the owner had never given notice in writing of his willingness to be rated whether the tenements should be occupied or not : *Held* that such reduction was improper, and that the occupier was disqualified from being placed on the list of voters.—*Bennett v. Atkins*, 27 W.R. 231.
- (iv.) **Q. B. Div.—School Board—Disqualification—33 & 34 Vict., c. 75, Sch. 2, Pt. 1, Ss. 12, 14.**—A member of a school board absented himself from the meetings during six months, and in consequence ceased to be a member : *Held* that he was not disqualified from being elected at the next general election.—*Regina v. Turmine*, 48 L.J. Q.B. 5 ; 27 W.R. 150.

**Evidence :—**

- (iv.) **Q. B. Div.—Highway Rate—Publication—5 & 6 Will. IV., c. 50, s. 34.**—The production of the rate-book is not sufficient evidence of the due publication of a highway rate.—*Bird v. Adcock*, 47 L.J. Q.B. 123.
- (v.) **C. A.—Information and Relief—Interlocutory Application.**—On a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, but when not objected to in the court below, cannot be objected to on appeal.—*Gilbert v. Endean*, L.R. 9 Ch. D. 259 ; 39 L.T. 404 ; 27 W.R. 252.

**Fishery :—**

- (iii.) **Q. B. Div.**—*Obstruction to Fish—Salmon Fishing*—24 & 25 Vict., c. 109.—A mill-dam had been used for fishing before 1859, and there were still broken remains of a box without internal appliances: The dam was referred to in a certificate of the Fishery Commissioners as a fishing mill-dam, but it was not shown that any increased obstruction to fish had been created since the Salmon Fishery Act, 1861: *Held* that the dam had ceased to be a fishing mill-dam, and that the provisions of the Salmon Fishery Act, 1861, did not apply.—*Pike v. Rossiter*, 39 L.T. 496.

**Highway :—**

- (iii.) **Q. B. Div.**—*Repair—License to get Materials*—5 & 6 Will. IV., c. 50, s. 54.—The license granted by justices to a surveyor to get materials for repair of a highway from enclosed lands under sec. 54 of 5 & 6 Will IV., c. 50, extends only to the particular occasion for which it is given.—*Earl Manvers v. Bartholomew*, L.R. 4 Q.B.D. 5; 48 L.J.M.C. 3; 39 L.T. 327; 27 W.R. 167.

**Husband and Wife :—**

- (xv.) **C. A.**—*Divorce—Foreign Subject*—20 & 21 Vict., c. 85, s. 27.—Decision of P.D.A. Div. (see *Husband and Wife* iv., p. 15) reversed.—*Niboyet v. Niboyet*, 39 L.T. 486; 27 W.R. 203.
- (xvi.) **C. A.**—*Divorce—Settlement—Variation*.—Decision of P.D.A. Div. (see *Husband and Wife* v., p. 15) affirmed.—*Marsh v. Marsh*, 47 L.J. P.D.A. 78; 39 L.T. 545
- (xvii.) **C. A.**—*Infants—Custody of—Religious Instruction*.—The right of a father to control the religious education of his children will not be interfered with in the absence of any conduct on his part showing him to be unfit to exercise such right, and the fact that children have been without his knowledge brought up in a faith of which he disapproves will be no ground for interference by the Court, nor will the father be held to have abandoned his legal right by making the children wards of Court.—*Agar-Ellis v. Lascelles*, 48 L.J. Ch. 1; 39 L.T. 380; 27 W.R. 117.
- (xviii.) **P. D. A. Div.**—*Infants—Custody of*—41 Vict., c. 19, s. 4.—An order by magistrates under sec. 4 of the Matrimonial Causes Act, 1878, giving the wife the legal custody of a child, will extend only till the child is ten years old.—*Grove v. Grove*, 39 L.T. 546.
- (xix.) **Ch. Div. V. C. M.**—*Marriage by Repute—Presumption—Evidence*.—Where A. and B. cohabited as man and wife for thirty years until B.'s death, but there was no evidence of the marriage, nor any affidavit in support of it by any of the family, but the children had always been treated as legitimate: *Held* that the children of A. and B. were entitled as legitimate children to share as next-of-kin in property devolving on the intestacy of B.'s brother.—*Collins v. Bishop*, 48 L.J. Ch. 31.
- (xx.) **C. P. Div.**—*Separate Estate—Earnings of Wife*—33 & 34 Vict., c. 93, s. 1.—A husband being incapacitated from carrying on his business was removed to a work-house infirmary, and the wife carried on the business in his absence, borrowing money for that purpose, and on his return continued to carry it on, he not interfering: *Held* that goods purchased by the wife for the purpose of trading were her separate property.—*Lovell v. Newton*, L.R. 4 C.P.D. 7.

**Injunction :—**

- (i.) **C. A.**—*Name of House—Right to Restrain use of*.—*Held* (reversing the decision of V.C.M. 39, L.T. 226) that the owner of a house which has been known for upwards of sixty years by a particular name has no

such property in the name as to entitle him to restrain the owner of another house from applying the same name to that house.—*Day v. Brownrigg*, 27 W.R. 217.

**Landlord and Tenant :—**

- (x.) **Ch. Div. V. C. B.**—*Agreement for Lease—Uncertain Term—Specific Performance.*—Defendant, lessee of a house for 80 years, agreed to let it to plaintiff for a certain rent, and to let him have a lease of it at that rent at any period he might feel disposed, and not to disturb plaintiff or raise his rent after he had laid out money on the premises: plaintiff laid out £150: *Held* that he was entitled to call for a lease for the residue of the 80 years less one day.—*Kusel v. Watson*, 47 L.J. Ch. 825.
- (xi.) **C. P. Div.**—*Lease—Agreement for New Lease—Tender of Rent.*—Defendant, having let five rooms to plaintiff for a term, entered into negotiations to let only three of the rooms at a less rent, and on next quarter-day received the lesser rent. The agreement was intended to be reduced into writing, but ultimately the parties disagreed. There was evidence that plaintiff had given up possession of two of the rooms: *Held* that the jury were justified in finding that there was a new tenancy. Plaintiff tendered rent to defendant with the words: "Here is your rent:" *Held*, a good tender.—*Jones v. Bridgeman*, 39 L.T. 500.
- (xii.) **Ch. Div. F. J.**—*Underlease—Executory Agreement—Pleading Inconsistent Relief.*—Plaintiff, who was about to take a renewed lease of premises, agreed to grant defendant a lease of them, such underlease to contain all such covenants and conditions as should be contained in the lease to plaintiff with such additions as might be necessary and proper, and also a provision that on non-performance of any of the agreements by tenant it should be lawful for plaintiff to re-enter and eject. The renewed lease contained a covenant by lessee not to convert premises into a shop or affix any outward mark of business thereon, and a proviso for re-entry if lessee should not observe, perform, and keep all covenants: defendant put in the window a wire blind with "H. B. & Co." on it, and also outside the entrance a brass plate with "H. B. & Co., Tailors," on it: *Held* that this was a breach of the covenant in the lease which must be taken as contained in the underlease, and that plaintiffs had a right of re-entry: but that as by his claim he asked for an injunction and damages, and alleged that he was ready and willing to execute the underlease, the prayer to recover possession was inconsistent, and therefore he was only entitled to the injunction and damages without costs.—*Evans v. Davis*, 89, L.T. 391.
- (xiii.) **Ch. Div. F. J.**—*Underlease by Administrator—Assignment—Merger.*—C., as administrator, held land for a term of years, which he demised to P. for a shorter term, and P. afterwards assigned this term to C.: in the first deed C. was described as administrator, but not in the second: *Held* that there was no merger in equity.—*Chambers v. Kingham*, 89 L.T. 472.

**Lands' Clauses Act :—**

- (iv.) **Ch. Div. M. R.**—*Payment out of Deposit—Petition by Vendor—Delay in Completing.*—When a railway company has entered into possession of land and paid money into Court under sec. 85 of the Lands' Clauses Act, 1845, the vendor is entitled to petition for payment out of the money to him on the company failing to complete: but the acceptance of the title by the company will not be presumed from mere delay in completing.—*Re Mutlow's Trusts*, 27 W.R. 246.

**Licensed House :—**

- (iii.) **Q. B. Div.**—*Certificate for License—Notice—Insufficiency—32 & 83 Vict., c. 27, s. 8.*—An applicant for a justice's certificate under 32 & 83



Vic., c. 27, authorizing the granting to him a license to sell beer by retail to be consumed off the premises under 3 & 4 Vict., c. 61, omitted to state in the notice that he already held a license for the same purpose under 26 & 27 Vict., c. 63: *Held* that he was entitled to the certificate.—*Regina v. Justices of Over Darwen*, 39 L.T. 444.

- (iv.) **Q.B.Div.**—*General License—Renewal—Discretion of Justices*—9 Geo. IV., c. 61, s. 1; 32 & 33 Vict., c. 27, ss. 8, 19.—Justices have a general discretion as to granting or refusing a renewal of a public-house license; secs. 8, 19 of the Wine and Beerhouse Act, 1869, being confined to applications for licenses for sale of beer, cider, and wine.—*Regina v. Smith*, 48 L.J. M.C. 88.

#### **Master and Servant:—**

- (ii.) **C. A.**—*Negligence—Common Employment*.—Plaintiff was hired by a man who contracted to unload a barge at defendants' brewery: he was paid by defendants, who alone could discharge him, and while working at the unloading was injured through the negligence of defendants' servants in moving barrels: *Held* that there was evidence to justify a finding that plaintiff was defendants' servant, and injured by a person engaged in a common employment.—*Charles v. Taylor, Walker, & Co.*, L.R. 3 C.P.D. 492; 27 W.R. 32.
- (iii.) **C. A.**—*Negligence—Common Employment*.—The signal service at a joint siding was managed at the joint expense of the North-Eastern & Great Northern Railway Cos., but the servants there were engaged and paid by the G. N. R. Co. alone: one of these servants was killed by the negligence of a North-Eastern Railway engine-driver: *Held* that deceased and the engine-driver were not engaged in a common employment.—*Swainson v. North-Eastern Rail. Co.*, L.R. 3 Ex. D. 341.

#### **Metropolitan Management:—**

- (iv.) **Q. B. Div.**—*Dangerous Structure—Owner or Occupier—Incumbent of Church*—18 & 19 Vict., c. 122, ss. 69-81.—The incumbent of a district church is not the owner or occupier of the church within the meaning of the Metropolitan Building Act, 1855.—*Regina v. Lee*, 48 L.J. M.C. 22; 27 W.R. 151.

#### **Mines:—**

- (v.) **Ex. Div.**—*Coal Mine—Checkweigher—Dismissal of Miners*—35 & 36 Vict., c. 76, s. 18.—Where owners of a coal mine dismiss all the miners, the office of a checkweigher appointed under Section 18 of the Coal Mines Regulation Act, 1872, is thereby determined.—*Whitehead v. Holdsworth*, L.R. 4 Ex. D. 13; 27 W.R. 94.

#### **Mortgage:—**

- (xii.) **C. A.**—*Ejectment by Mortgagee—Pending Administration*.—The Court will not stay an action of ejectment by a mortgagee against his tenants, on the application of an executor to a testator of whose estate the mortgaged property formed part on the ground of a pending administration action.—*Crowle v. Russell*, 39 L.T. 320; 27 W.R. 84.
- (xiii.) **Ch. Div. M. R.**—*Estoppel—Grant—Covenant for Title*.—By a deed containing no recitals but with usual covenants for title, A. purported to grant B. a freehold estate by way of mortgage: at the date of the deed A. had no interest in the property, but subsequently he acquired the legal estate which he mortgaged to C.: *Held* that no estoppel had been created in favour of B. as against C.—*General Finance Co. v. Liberator Building Society*, L.R. 10 Ch. D. 15; 27 W.R. 210.
- (xiv.) **Ch. Div. M. R.**—*Executor—Retainer*.—A. having mortgaged life policies to solicitors died insolvent. The solicitors received the policy

monies, and A.'s executrix filed a bill against them for accounts and payment over of the surplus, and after obtaining a decree for the usual accounts died, having appointed one of the solicitors her executor: *Held* that the solicitor could not retain the balance in payment of a simple contract debt due to them from A.—*Talbot v. Frere*, L.R. 9 Ch. D. 568; 27 W.R. 148.

- (xv.) **Ch. Div. M. R.**—*Foreclosure—Heirship not proved—Action dismissed.*—Judgment having been obtained in a foreclosure action against an alleged heir-at-law of mortgagor, and a contract for sale entered into; it being found that there was no evidence of the alleged heirship of defendant, judgment was set aside, and action dismissed without costs.—*Lancaster Banking Company v. Cooper*, L.R. 9 Ch. D. 594; 27 W.R. 164.
- (xvi.) **C. A.**—*Injunction—Parties—Action by Mortgagor.*—When no notice of intention to take possession has been given by mortgagee, mortgagor can maintain an action for injunction against a breach of covenant affecting mortgaged premises, without joining mortgagee as a party.—*Fairclough v. Marshall*, 39 L.T. 389; 27 W.R. 145.
- (xvii.) **Ch. Div. F. J.**—*Priority—Trustee—Solicitor.*—Plaintiff contributed £500 and his solicitor £300 to a loan on deposit of deeds, and afterwards the solicitor took a mortgage to himself for the £800, and deposited the title deeds with a bank as security for a loan of £400: *Held* that plaintiff had priority over the bank for his £500.—*Bradley v. Riches*, L.R. 9 Ch. D. 189; 47 L.J. Ch. 811; 26 W.R. 910.

#### **Municipal Law:—**

- (iii.) **C. P. Div.**—*Fees to Justices' Clerk—Conviction under Vagrant Act, 5 & 6 Will. IV., c. 76.*—A station-master gave a person into custody of a constable on the charge of picking pockets at the railway station, and afterwards appeared and gave evidence before the borough justices, when the prisoner was convicted under the Vagrant Act: *Held* that the station-master was not liable for the justices' clerk's fees.—*Reddish v. Hitchinor*, 48 L.J. M.C. 81.
- (iv.) **C. A.**—*Local Board—Street—Vesting—38 & 39 Vict., c. 55, s. 149.*—The vesting of a street by sec. 149 of Public Health Act, 1875, in an Urban Authority gives them a right to let the pasturage by the side of such street.—*Coverdale v. Charlton*, 27 W.R. 257.
- (v.) **Ch. Div. F. J.**—*Rebuilding—Depositing Plans—Approval—38 & 39 Vict., c. 55.*—The owner of a house had left with a local board a plan of an intended new building, and the board had approved of it and offered him £40 compensation for certain land to be thrown into the street which he refused, but proceeded to pull down the old house; subsequently the board passed a resolution abandoning the terms offered, and requiring the owner to set his frontage further back: *Held* that having approved of the original plan the board could not compel the owner to alter it.—*Masters v. Pontypool Local Board*, L.R. 9 Ch. D. 677; 47 L.J. Ch. 797.

#### **Negligence:—**

- (ii.) **Ex. Div.**—*Excavation near Highway—Fencing—5 & 6 Will. IV., c. 50, s. 70.*—A contractor made an excavation within 5 yards of a highway and fenced it off therefrom: plaintiff's horse drawing a cart loaded with a ton weight backed the cart against the fence which gave way, and in consequence the horse was dragged down the excavation: *Held* that the contractor was not liable to the owner of the horse.—*Blakeley v. Baker*, 39 L.T. 859.



- (iii.) **Ex. Div.**—*Injury to Cattle—Noxious Tree—Adjoining Occupier*.—If a man knowingly plant on his land and suffer to grow over the land of his neighbour a noxious tree whereby his neighbour's cattle are injured, an action will lie against him at the suit of his neighbour.—*Crowhurst v. Amersham Burial Board*, L.R. 4 Ex. D. 5; 39 L.T. 355; 27 W.R. 95.

#### Palatine Court of Lancaster:—

- (ii.) **Ch. Div. M. R.**—*Stay of Proceedings—Foreclosure—Property out of Jurisdiction*.—The High Court will not stay proceedings in an action of foreclosure or sale, in the Palatine Court, where the property is without the jurisdiction of the latter, but both the mortgagor and mortgagee are within the jurisdiction.—*Re Longdendale Cotton Spinning Co.*, 48 L.J. Ch. 54.

#### Partition:—

- (ii.) **Ch. Div. V. C. B.**—*Sale—Disability—Person Authorised to Ask*—39 & 40 Vict., c. 17, s. 6.—On a request for sale under the Partition Act, 1876, section 6, counsel, if instructed, is a person authorised to act on behalf of a person under disability.—*Crookes v. Whitworth*, 39 L.T. 348; 27 W.R. 149.

#### Partnership:—

- (v.) **Ch. Div. V. C. M.**—*Articles—Accounts—Variation*.—Partnership articles provided that the accounts should be taken half-yearly, and that the share of any partner who died should be taken to be the sum due up to last account, and an additional sum in lieu of subsequent profits, calculated at a fixed rate: in practice the accounts were only taken yearly, and one of the partners wrote a letter to the others approving of this plan: *Held*, on the death of this partner, that his interest under the articles was not affected by the custom of taking the accounts yearly, or by his approval of it.—*Lawes v. Lawes*, L.R. 9 Ch. D. 98; 27 W.R. 186.
- (vi.) **C. A.**—*Contract by Partners—Joint and Several Liability*.—When a person has obtained judgment against one member of a partnership for breach of contract entered into by the partnership, he cannot maintain an action in respect of the same breach against another member.—*Kendall v. Hamilton*, L.R. 3 C.P.D. 403; 47 L.J. C.P. 665; 39 L.T. 250; 27 W.R. 121.
- (vii.) **C. A.**—*Loan*—28 & 29 Vict., c. 86, s. 1.—The question whether or not an advance of money to a firm constitutes the lender a partner must be decided from the whole circumstances of the case, and not merely by a proviso in the articles that he shall not be a partner.—*Es parte Delhase, Re Megevand*, 47 L.J. Boy. 65.
- (viii.) **Ch. Div. V. C. H.**—*Property and Effects—Goodwill*.—*Held* that "goodwill" must be taken into account in estimating the value of the property and effects of a partnership on a dissolution.—*Reynolds v. Bullock*, 47 L.J. Ch. 773; 39 L.T. 443.
- (ix.) **Ch. Div. M. R.**—*Settled Accounts—Error—Liberty to Surcharge and Falsify*.—In a partnership action seeking to open settled accounts, one error of £950 being established, leave to surcharge and falsify was given to plaintiff, such liberty not to be confined to errors appearing from the books.—*Gething v. Keighley*, L.R. 9 Ch. D. 547; 48 L.J. Ch. 45.

#### Patent:—

- (iii.) **C. A.**—*Infringement—Property of Foreign Sovereign—Injunction*.—A foreign sovereign bought in Germany shells made there, and which were infringements of an English patent: they were brought to England in order to put them on board a man-of-war of the foreign sovereign, and the patentee obtained an injunction against the agents

of the sovereign and the persons who had charge of the shells restraining their removal: the foreign sovereign applied to be made defendant, and obtained an order for liberty to remove the shells.—*Vavasseur v. Krupp*, L.R. 9 Ch. D. 351; 39 L.T. 437; 27 W.R. 176.

- (iv.) **Ch. Div. M. R.**—*Threatened Infringement—Injunction*.—A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, though no infringement has taken place.—*Frearson v. Loe*, L.R. 9 Ch. D. 48; 27 W.R. 183.

**Poor Law :—**

- (ii.) **Q. B. Div.**—*Settlement—Criminal Lunatic*—3 & 4 Vict., c. 54, s. 7.—An order by justices for maintenance of a female criminal lunatic, detained in an asylum, should be made on the union in which her husband's last legal settlement is at the time of making the order.—*Barton Regis Union v. Berkshire Clerk of Peace*, 39 L.T. 445.
- (iii.) **Q. B. Div.**—*Settlement—Derivative Settlement of Father*—39 & 40 Vict., c. 61, s. 25.—Where a pauper has acquired no settlement of his own, and whose father has only a derivative settlement, the pauper has a settlement at his own, and not his father's, birthplace.—*Woodstock Union v. St. Pancras Churchwardens*, L.R. 4 Q.B.D. 1; 48 L.J. M.C. 1; 39 L.T. 256; 27 W.R. 229.

**Power of Appointment :—**

- (ii.) **Ch. Div. V. C. H.**—*Excessive Appointment*.—A person having power to appoint to such of her issue as should be living at the time of appointment, by deed appointed to the children of her daughter, in equal shares, on their attaining twenty-one: the daughter had three children at the date of the deed and three born afterwards: *Held* that each of the first three, on attaining twenty-one, would take a sixth of the property, together with an accruing share of the sixths of the others of the first three who might die under twenty-one, and that the remaining half of the property would go as in default of appointment.—*Re Farncombe's Trusts*, L.R. 9 Ch. D. 652.

**Practice :—**

- (lxiii.) **Ch. Div. V. C. H.**—*Administration Decree—Subsequent Action Against Executor*—*Consol. Ord.* 31, r. 11.—Where plaintiff has obtained an administration decree against an executor and, in the subsequent inquiries, has obtained materials for a case of wilful default, he cannot bring a fresh action charging wilful default without leave of the Court.—*Laming v. Gee*, 27 W.R. 227.
- (lxiv.) **H. L.**—*Appeal—Quarter Sessions—Poor Rate—Judicature Act, 1873, s. 19*.—An appeal lies from the Judgment of the Q.B. Div. on a case stated for its opinion by a Court of Quarter Sessions: decision of C. A. (see *Practice* ix., p. 24) reversed.—*Walsall Overseers v. L. & N. W. Rail. Co.*, 39 L.T. 453; 27 W.R. 189.
- (lxv.) **C. A.**—*Appeal—Refusal of Application*—*Ord.* 58, r. 15.—A petitioner applied for payment out of Court of the whole of a fund, his title to one-half of which was not disputed, and the Court ordered payment to him of one-half only: *Held* that an appeal from this order was not from the refusal of an application.—*Re Michell's Trusts*, L.R. 9 Ch. D. 5; 48 L.J. Ch. 50.
- (lxvi.) **C. A.**—*Appeal—Security for Costs*—*Ord.* 58, r. 15.—Where plaintiff was a pauper, and brought an action for administration of an estate against a person who had obtained letters of administration, on appeal from an order refusing an injunction to restrain defendant from dealing with the estate, and for a receiver: *Held* that the fact of the plaintiff not having

first taken proceedings to have the letters of administration revoked, justified the Court in requiring security for costs.—*Hankin v. Turner*, 39 L.T. 285; 27 W.R. 20.

- (lxvii.) **C. A.**—*Appeal—Security for Costs—Ord. 40, r. 10.*—A defendant in insolvent circumstances gave two notices of appeal in an action tried before a judge alone, and also moved for a rule nisi for a new trial: *Held* that as the appeals were unnecessary defendant must give security for costs.—*Waddell v. Blockey*, 27 W.R. 233.
- (lxviii.) **C. A.**—*Appeal—Setting Down—Mistake—Ord. 58, r. 8.*—An appeal must be entered before the day mentioned in the notice of appeal, or, if the day named is in vacation, before the next day on which the Court sits: a mistake of the meaning of the rules of Court by counsel or solicitor is not sufficient reason for granting an extension of time.—*Rhodes v. Jenkins, In re Mansel*, 47 L.J. Ch. 870.
- (lxix.) **C. A.**—*Appeal—Time—New Trial.*—A rule for a new trial having been made absolute, *held* that an appeal from the order could not be brought after twenty-one days; leave to extend time for appealing refused.—*Highton v. Treherne*, 39, L.T. 411; 27 W.R. 245.
- (lxx.) **C. A.**—*Appeal—Time—Verdict of Judge.*—Where a judge of the Ch. Div. has pronounced a verdict on a question of fact and subsequently delivered judgment, the verdict is an interlocutory order and must be appealed from within twenty-one days, such appeal being in the form of an application for a new trial.—*Krehl v. Burrell*, 39 L.T. 461; 27 W.R. 324.
- (lxxi.) **C. A.**—*Appeal—Verdict Directed by Judge—New Trial—Ord. 40, r. 4 a.*—When a judge directs the jury to find a verdict for one of the parties and gives judgment, the other party cannot appeal to the Court of Appeal, but must apply to the Divisional Court for a new trial.—*Yetts v. Foster*, L.R. 3 C.P.D. 132.
- (lxxii.) **C. P. Div.**—*Appeal from County Court—Entering Judgment—38 & 39 Vict., c. 50, s. 6.*—On appeal by motion under the County Courts Act, 1875, s. 6, the Court has power to order judgment to be entered as provided by 13 & 14 Vict., c. 61, s. 14.—*Whiteman v. Hawkins*, L.R. 4 C.P.D. 13.
- (lxxiii.) **C. P. Div.**—*Appeal from County Court—Time—38 & 39 Vict., c. 50, s. 6.*—Where in order to extend the time for appealing, a County Court Judge allowed his judgment to be entered as delivered a fortnight after the day on which it was delivered: *Held* that the time within which an appeal must be brought was eight days from the day on which the judgment was actually pronounced.—*Wilberforce v. Sowton*, 48 L.J., C.P. 28; 39 L.T. 474.
- (lxxiv.) **Ex. Div.**—*Appeal from Master—Time—Ord. 54, r. 4.*—A summons on appeal to judge at chambers from the master must be returnable before the judge within four days from the decision of the master.—*Bell v. North Staffordshire Railway Co.*, 27 W.R. 263.
- (lxxv.) **C. A.**—*Appearance—Notice—Default.*—A writ of summons was issued in a district registry: defendant entered appearance in London, but gave no notice to plaintiff's solicitor in the district: *Held* that plaintiff was entitled to sign judgment for default of appearance.—*Smith v. Dobbin*, L.R. 3 Ex. D. 338.
- (lxxvi.) **Ch. Div. F. J.**—*Costs—Administration—Partial Distribution.*—Executors and trustees distributed three-fourths of testator's residuary estate, but neglected to give accounts of or pay the income of the remaining fourth to the person entitled; on an administration action, *held* that the trustees were personally liable for the costs of action, except those

of the accounts and enquiries, which must be born by the whole of the residue, and that the trustees were also personally liable for the share of these costs falling on the residue already distributed.—*Bath v. Bell*, 39 L.T. 422.

(lxxvii.) **Ex. Div.**—*Costs—Claim for £50 and Interest*—30 & 31 Vict., c. 142, s. 7.—A claim for £50 and interest is a claim exceeding £50 within sec. 7 of County Courts Act, 1867, and when an action on such a claim is brought in the High Court, it is not competent for a judge to order on dismissing an application by defendant to have the action tried in the County Court, that if £50 only be recovered, plaintiff shall only be entitled to County Court costs.—*Insley v. Jones*, L.R. 4 Ex. D. 16; 27 W.R. 111.

(lxxviii.) **C. P. Div.**—*Costs—Counter Claim—Summons to Vary Entry*.—On the findings of the jury in an action the judge directed a verdict to be entered for plaintiff for the balance of his claim over the counter claim. On summons to vary entry by stating that plaintiff and defendant respectively recovered, so as to give defendant costs of counter claim, the Court refused to interfere.—*Poffer v. Chambers*, 39 L.T. 350.

(lxxix.) **Ch. Div. M. R.**—*Costs—Discretion of Court—Trade Mark Registration*.—The costs of and incident to all proceedings that have actually come into the Court only are within the discretion of the Court under Order 55; and a case under the Trade Marks Regulation Acts does not come into Court until the parties opposing registration have given security for costs under Rule 18 of Trade Marks Rules, 1876.—*Re Brandreth's Trade Mark*, L.R. 9 Ch. D. 618; 47 L.J. Ch. 816.

(lxxx.) **Q. B. Div.**—*Costs—No Order by Judge at Trial—Ord. 55*.—When in an action before a jury no application as to costs is made at the trial, a subsequent application may be made to the Divisional Court, if made within a reasonable time.—*Bowey v. Bell*, *Brooks v. Israel*, 27 W.R. 247.

(lxxxi.) **C. A.**—*Costs—Revivor*.—A plaintiff having obtained a decree with costs, died, and subsequently defendant gave notice of appeal: the executor of plaintiff then obtained the common order to revive, and the action was dismissed with costs on the appeal: *Held* that the executor was personally liable for the costs.—*Boynton v. Boynton*, L.R. 9 Ch. D. 250; 27 W.R. 141.

(lxxxii.) **H. L.**—*Costs—Slander*—21 Jac. 1, c. 16—Ord. 55.—Section 6 of 21 Jac. 1, chapter 16, is repealed by Ord. 55.—*Garnett v. Bradley*, L.R. 3 App. 944; 39 L.T. 261.

(lxxxiii.) **C. P. Div.**—*Costs—Taxation*.—The Court will not interfere with the master's discretion as to the amount allowed for counsel's fees unless it is obvious that he has failed to exercise it reasonably.—*Hargreaves v. Scott*, L.R. 4 C.P.D. 21.

(lxxxiv.) **P. D.**—*Costs—Taxation—Negligence of Solicitor*.—On taxation of costs of a cause between solicitor and client, the registrar cannot consider objections raised by the client to some of the items on the ground that they were incurred in consequence of the solicitor's negligence.—*The Papa de Rossie*, L.R. 3 P.D. 160.

(lxxxv.) **C. A.**—*Costs—Taxation—Ord. 3, r. 7*.—Where a writ was indorsed with the amount of a debt and a sum claimed for costs, and defendant after the expiration of four days from service paid to plaintiff the whole amount which he accepted: *Held* that defendant was entitled to have the costs taxed.—*Hoole v. Earnshaw*, 39 L.T. 409.

(lxxxvi.) **C. A.**—*Costs—Taxation—Short-hand Notes*.—Plaintiff and defendant having agreed that a short-hand writer should be employed at the hearing at their joint expense, an order was made in favour of defendant from which plaintiff appealed, and the appeal was dismissed with costs:

*Held* that the taxing master could not, in the absence of special directions by the Court, allow the costs of copies of the notes or the sum paid by defendant to short-hand writer.—*Ashworth v. Outram*, L.R. 9 Ch. D. 483; 39 L.T. 441; 27 W.R. 98.

- (lxxxvii.) **Ex. Div.**—*Costs—Taxation—Short-hand Notes*.—The costs of making copies of the transcript of short-hand notes will not be allowed on taxation in the absence of any direction by judge at trial.—*Wills v. Mitcham Gas Co.*, L.R. 4 Ex. D. 1; 27 W.R. 112.
- (lxxxviii.) **C. A.**—*Default of Appearance—Married Woman—Judgment set Aside*.—A married woman was sued on a cheque which she had signed at her husband's request, and handed the writ to him, he promising to attend to it: no appearance was entered, and judgment was signed: more than a year afterwards, a summons to commit her having been taken out, the judgment was set aside on her application.—*Attwood v. Chichester*, L.R. 3 Q.B.D. 722.
- (lxxxix.) **C. P. Div.**—*Discovery—Affidavit of Documents*.—The omission of the words, "and never have had," from an affidavit of documents is sufficient reason for ordering a further affidavit.—*Wagstaffe v. Anderson*, 39 L.T. 332.
- (xc.) **C. A.**—*Discovery—Interrogatories*.—Where plaintiff sued as administrator on a breach of covenant, and defendants alleged a verbal consent by intestate to the breach: *Held* that plaintiff could interrogate defendant as to when the consent was given, but not as to the persons present at the time.—*Eade v. Jacobs*, L.R. 3 Ex. D. 335.
- (xci.) **C. A.**—*Discovery—Interrogatories—Striking out—Ord. 31, r. 5*.—A party who applies to strike out interrogatories must, unless they are altogether objectionable, specify those to which he objects.—*Allhusen v. Labouchere*, L.R. 3 Q.B.D. 654; 47 L.J. Q.B. 819; 39 L.T. 207; 27 W.R. 12.
- (xcii.) **Ch. Div. M. R.**—*Discovery—Interrogatories—Time for Delivery*.—In an ordinary action in the Chancery Division interrogatories may be delivered before statement of defence.—*Harbord v. Monk*, L.R. 9 Ch. D. 616; 27 W.R. 164.
- (xciii.) **C. A.**—*Discovery—Production of Court Rolls*.—In an action concerning disputed rights as to a sheepwalk, plaintiff alleged that he was a freeholder of a farm, and as such entitled to the sheepwalk; and defendant, the lord of the manor, alleged that plaintiff was only a freehold tenant of the manor in respect of the farm: *Held* that plaintiff was not entitled to the production of the Court rolls of the manor.—*Owen v. Wynn*, L.R. 9 Ch. D. 29.
- (xciv.) **C. A.**—*Discovery—Production of Documents—Privilege*.—A party making an affidavit as to documents and claiming protection for some of them as privileged will not be required to identify those for which protection is claimed further than he would if no protection was claimed.—*Taylor v. Batten*, 39 L.T. 408; 27 W.R. 106.
- (xcv.) **Ex. Div.**—*Discovery—Production of Documents—Ord. 31, r. 12*.—In the absence of an affidavit, showing circumstances rendering immediate discovery necessary, no order for discovery of documents will be made before delivery of statement of defence.—*Hancock v. Guerin*, L.R. 4 Ex. D. 8; 27 W.R. 112.
- (xcvi.) **Ch. Div. V. C. M.**—*Evidence—Commission*.—Defendant company, which was registered in England and whose business was in Paris, applied for a commission to examine witnesses at Paris and Boulogne, and in their affidavit stated that certain persons residing there were necessary witnesses: the Court ordered the commission to issue, and required no security for costs.—*Spiller v. Paris Skating Rink Co.*, 27 W.R. 225.

- (xcvii.) **C. A.**—*Injunction—Foreign Suit*.—The Court will not, in the absence of special circumstances, interfere to restrain by injunction proceedings taken in a foreign Court.—*Fletcher v. Rodgers*, 27 W.R. 97.
- (xcviii.) **C. A.**—*Interpleader—1 & 2 Will. IV., c. 58, s. 1.*—Decision of C. P. Div. (see *Practice* xli., p. 27) reversed.—*Attenborough v. St. Katherine's Dock Co.*, L.R. 3 C.P.D. 450; 47 L.J. C.P. 763.
- (xcix.) **C. A.**—*Leave to Sign Judgment—Affidavit—Ord. 14, r. 1.*—It is not necessary under Ord. 14, r. 1, that the affidavit of plaintiff should be made prior to the granting of the summons calling on defendant to show cause against signing final judgment.—*Begg v. Cooper*, 27 W.R. 224.
- (c.) **C. A.**—*Motion to Enter Judgment—Misdirection—Ord. 40, r. 4.*—Where defendant at close of plaintiff's case asked the judge to withdraw the case from the jury and enter judgment for him, but the judge left certain questions to the jury, who found in plaintiff's favour: *Held* that defendant could not move in the Court of Appeal to set aside the judgment under Ord. 40, r. 4, as it was, in effect, asking for a new trial, but he must first go to a Divisional Court.—*Davies v. Felix*, 48 L.J. Q.B. 3; 39 L.T. 322; 27 W.R. 108.
- (ci.) **Ch. Div. V. C. B.**—*Parties—Action by Life-Tenant against Executor.*—A tenant for life under a will brought an action against the executor, claiming that certain mortgage debts on the estate, which had been paid off out of income, should have been paid out of corpus, and repayment of the money, and, so far as necessary, administration of trusts of will: *Held* that the remainder-men were not necessary parties.—*Bemment v. Balls*, 47 L.J. Ch. 781.
- (cii.) **Ch. Div. F. J.**—*Parties—Death of Defendant—Leave to Amend.*—Where in an action against a defendant for damages occasioned by defendant's fraud, he dies, leave may be obtained, *ex parte*, to amend the statement of claim so as to make a *prima facie* case against defendant's personal representatives, and to add such representatives as defendants.—*Ashley v. Taylor*, 27 W.R. 228.
- (ciii.) **C. A.**—*Parties—Death of Plaintiff—Ord. 50, r. 4.*—Plaintiff in an action, having recovered a verdict against defendants for statutory fraud, died while an appeal was pending in the House of Lords: *Held* that administratrix of plaintiff was entitled to be made a party under Ord. 5, r. 4.—*Twycross v. Grant*, 48 L.J. C.P. 1; 27 W.R. 87.
- (civ.) **C. P. Div.**—*Parties—Joinder of Indorsees and Drawer of Bill.*—A statement of claim contained claims by the indorsees of a bill of exchange and by the drawer: *Held* such a statement must be struck out as embarrassing.—*Smith v. Richardson*, 27 W.R. 230.
- (cv.) **Ch. Div. M. R.**—*Parties—Partition—Ord. 16, r. 7.*—In partition actions trustees may be treated as sufficiently representing the beneficiaries.—*Simpson v. Denny*, L.R. 10 Ch. D. 28.
- (cvi.) **Ch. Div. V. C. B.**—*Parties—Redemption—Consolidation of Mortgages.*—When a mortgagor brings a redemption action, and mortgagee insists on an admitted right to consolidate the mortgage with another on lands, of which a third party is mortgagor, the Court will not make any decree in the absence of such third party.—*Mills v. Jennings*, 39 L.T. 442.
- (cvii.) **Ch. Div. M. R.**—*Parties—Representative Party—Ord. 16, r. 14; 31, r. 4.*—The practice of making an officer of a corporation a party for the purpose of discovery is now abolished: a person must show that the parties having the same interest are numerous before he can be authorised to defend on behalf of all such parties.—*Wilson v. Church*, L.R. 9 Ch. D. 552; 39 L.T. 413.
- (oviii.) **Ch. Div. M. R.**—*Payment into Court—Administration Summons.*—When it is doubtful to whom a legacy is payable the executor should not



pay the legacy into Court, but take out an administration summons, and accounts being waived, the decision of the judge may be obtained on a statement of facts in the nature of a special case.—*Re Birkett*, L.R. 9 Ch. D. 576; 39 L.T. 418; 27 W.R. 164.

- (cix.) **C. A.**—*Payment into Court—Admission of Liability.*—After a decree directing accounts in Chambers, if it appears, before the chief clerk's certificate as to the ultimate balance is made, that a certain sum will probably be found due from either party, the Court has power to order such sum to be paid into Court: an admission of liability sufficient to support a motion for payment into Court may be made by the party or his agent, without appearing in the pleadings or affidavits.—*London Syndicate v. Lord*, 48 L.J. Ch. 57.
- (cx.) **Ch. Div. V. C. M.**—*Payment of Dividends—Infant Entitled to Stock*—11 Geo. IV. & 1 Will. IV., c. 65.—An infant was beneficially entitled to a sum of consols standing in her name: on a petition presented in an action, and under sec. 32 of 11 Geo. IV. & 1 Will. IV., c. 65, by her father, and by the infant by her father as next friend, payment of the dividends to the father for the infant's benefit was ordered.—*Ramon v. Ramon*, 39 L.T. 532; 27 W.R. 260.
- (cxi.) **Ch. Div. F. J.**—*Payment out of Court—Trustee Relief Act—Service of Petition—Chancery Funds Amended—Orders*, 1874, r. 8.—Where the rights of parties to money paid into Court under the Trustee Relief Act have been declared in an action, it is unnecessary to serve the petition for payment out on persons not interested, though they are stated by the trustee's affidavit to be interested.—*Re Fosbury's Trusts*, 39 L.T. 422.
- (cxii.) **C. A.**—*Payment out of Court—Woman past Child-bearing.*—The Court refused to treat a woman as past child-bearing who was fifty-four years and a half old, but had only cohabited with her husband during the last three years.—*Croxtan v. May*, L.R. 9 Ch. D. 388; 39 L.T. 461.
- (cxiii.) **C. A.**—*Pleading—Amendment—Admission by Mistake.*—A defendant in denying that he had offered a bribe, as alleged by the statement of claim, denied only that he had offered the particular sum stated: in an affidavit filed in the action he denied that he had offered that or any other sum: *Held*, reversing the decision of Fry, J. (L.R. 7 Ch. D. 403; 47 L.J. Ch. 263; 38 L.T. 60; 26 W.R. 263) that he must have liberty to amend.—*Tildesley v. Harper*, 27 W.R. 249.
- (cxiv.) **C. P. Div.**—*Pleading—Counter Claim—Ord. 17, r. 5; Ord. 19, r. 3.*—Where plaintiff sued in her own right, defendant was not allowed to set up as a counter-claim, a claim against plaintiff as executrix.—*Macdonald v. Carington*, 39 L.T. 426; 27 W.R. 153.
- (cxv.) **C. A.**—*Pleading—Demurrer.*—A defendant who has put in a statement of defence may afterwards demur to an amended statement of claim, though no substantially new case is made by the amendment.—*Powell v. Jewesbury*, L.R. 9 Ch. D. 34; 39 L.T. 213; 27 W.R. 142.
- (cxvi.) **Ch. Div. V. C. M.**—*Pleading—Demurrer—Statute of Limitations.*—A defence under the Statute of Limitations may in all cases be raised by demurrer.—*Noyes v. Crawley*, L.R. 10 Ch. D. 31; 39 L.T. 267; 27 W.R. 109.
- (cxvii.) **Q. B. Div.**—*Pleading—Statement of Claim—Ejectment.*—In an action for the recovery of land, the Statement of Claim alleged that plaintiff was heir male of the body of certain persons, and heir-at-law of another person, all of whom at the time of their deaths were possessed in fee simple of the property in question, and that under certain deeds, assurances, and wills in the possession of defendants, plaintiff as such heir male, and heir-at-law was entitled to possession of the property: *Held* that the Statement of Claim was not embarrassing.—*Phillips v. Phillips*, 39 L.T. 329.

- (cxviii.) **Ch. Div. V. C. B.**—*Receiver—Costs—Judicature Act, 1873, s. 25.*—Defendant, who had been ordered to pay plaintiff's costs, was entitled to a life estate in consols standing in the names of trustees, and subject to various incumbrances. On motion of plaintiff a receiver was appointed of defendant's life interest until the costs should be paid; the Court holding that it was unnecessary to serve the incumbrancers and trustees.—*Bryant v. Bull*, 39 L.T. 470; 27 W.R. 246.
- (cxix.) **C. A.**—*Receiver—27 & 28 Vict., c. 112, s. 1—Judicature Act, 1873, s. 25—Ord. 42, r. 1.*—A judgment creditor having issued a writ of *elegit* against real estate, of which defendant was in possession, but the legal estate of which was vested in a mortgagee, brought an action claiming a charge on the estate, and for delivery in execution; a receiver was appointed on the creditor's interlocutory application.—*Anglo-Italian Bank v. Davies*, L.R. 9 Ch. D. 275; 47 L.J. Ch. 833; 39 L.T. 244; 27 W.R. 3.
- (cxx.) **Q. B. Div.**—*Security for Costs.—Dismissal of Action.*—If plaintiff fail to comply with an order to give security for costs, it is in the discretion of the Court to dismiss the action.—*De la Grange v. M'Andrew*, 39 L.T. 500.
- (cxxi.) **C. P. Div.**—*Service—Defendant out of Jurisdiction—Affidavit—Ord. 11, r. 1a.*—An affidavit on application to serve writ of summons on a defendant in Scotland is insufficient if it omits to state whether there exists in Scotland a local court having jurisdiction in the matter in question as required by Order 11, r. 1a.—*Wood v. Mac Innes*, 27 W.R. 49.
- (cxxii.) **C. A.**—*Service—Foreign Defendant out of Jurisdiction.*—In all actions where defendant is a foreigner residing out of the jurisdiction he must be served with notice of the writ of summons, not with the writ.—*Padley v. Camphausen*, 27 W.R. 217.
- (cxxiii.) **P. D. A. Div.**—*Stay of Proceedings—Costs of Abortive Action.*—A. brought an action against B. in P.D.A. Div. for revocation of letters of administration granted to B.; the Court refused to stay the action until costs of an action for administration, which A. had brought in the Ch. Div. and which had been dismissed for want of prosecution, were paid.—*Hankin v. Turner* (2), 27 W.R. 232.
- (cxxiv.) **Ch. Div. V. C. B.**—*Transfer of Action—Ord. 51, r. 2a.*—An action was brought in the Ex. Div. against an executor personally in respect of a debt due from his testator's estate, charging devastavit: after an order had been obtained in the Ch. Div. for the administration of the estate, the executor applied to have the action against him transferred to the Ch. Div. and stayed: the Court transferred the action, but refused to stay it.—*Re Timms*, 47 L.J. Ch. 831.
- (cxxv.) **C. A.**—*Transfer of Action—Consolidation—Ord. 51, rr. 1-4.*—A decree having been made in an action in the Ch. Div. for administration of the personalty of an intestate, and for an inquiry as to whether his moiety of some real estate had become assets in a partnership business in which he was engaged, the surviving partner brought an action for winding-up the partnership in another branch of the Ch. Div.: *Held*, that this action ought to be transferred to the judge before whom the administration action was.—*Davis v. Davis*, 48 L.J. Ch. 40.
- (cxxvi.) **Ch. Div. F. J.**—*Trial—Counter-Claim—Evidence.*—The Court being of opinion that it would be more convenient that the claim and counter-claim in an action should be tried separately, directed the defendant's counsel at the trial of the claim to confine his cross-examination of plaintiff's witnesses to the questions raised thereon, giving him leave to call the plaintiff's witness as his own on the counter-claim.—*Thompson v. Woodfine*, 47 L.J. Ch. 832.



**Principal and Agent:—**

- (v.) **H. L.—Broker—Marine Insurance—Sub-Agent—Lien.**—An insurance broker employed as sub-agent by another broker to effect marine policies has the same rights of lien as if directly employed by principal.—*Fisher v. Smith*, 39 L.T. 430, 27 W.R. 113.
- (vi.) **H. L.—Commission on Sale—Proximate Cause.**—Defendant employed plaintiff to sell a ship, under an agreement that he should receive a commission if a sale should be effected to any person led to make an offer in consequence of his publication or mention of it: plaintiff advertised the ship for sale, and it was purchased by S., who heard of it from a person who had been in communication with plaintiff: *Held* that there was evidence to go to the jury that the sale was effected in consequence of plaintiff's mention or publication.—*Bayley v. Chadwick*, 39 L.T. 429.
- (vii.) **Q. B. Div.—Commission on Sale—Revocation of Authority—Subsequent Sale.**—Defendant agreed to give plaintiff a commission on his procuring a purchaser for defendant's ship: plaintiff negotiated with A. with regard to a sale, but the negotiation proved abortive, and defendant told plaintiff to do nothing more about selling the ship: subsequently A. introduced to defendant a purchaser who bought the ship: *Held* that plaintiff was not entitled to any commission, although the jury found on the facts that A. was induced to enter into the negotiation by the information received from plaintiff.—*Wilkinson v. Alston*, 48 L.J. Q.B. 37.
- (viii.) **C. A.—Commission—Procuring Loan.**—Defendant agreed, if plaintiff procured him a loan of £2,000, or such other sum as he should accept, to pay him a commission on any money received. Plaintiff procured an offer from a building society to advance defendant £1,620 on certain terms, which defendant accepted; but subsequently declined to comply with certain requirements, and no money was advanced: *Held* that plaintiff was entitled to his commission.—*Fisher v. Drewett*, 48 L.J. Ex. 32; 39 L.T. 253; 27 W.R. 12.
- (ix.) **C. P. Div.—Commission—Procuring Partner.**—Defendant agreed to give plaintiff a remuneration in the event of his taking into partnership M., whom plaintiff had introduced. Subsequently defendant entered into a written agreement with M. that they should enter into partnership from a future day, when a deed of partnership should be executed. No such deed was ever executed, nor did M. ever act as a partner: *Held* that plaintiff was entitled to his commission.—*Harris v. Petherick*, 39 L.T. 543.
- (x.) **Ch. Div. M. R.—Commission—Opening Accounts—Overcharges.**—In dealings between principal and agent, one case of proved fraudulent overcharge is sufficient to open the accounts between the parties.—*Williamson v. Barbour*, L.R. 9 Ch. D. 529.

**Probate:—**

- (vii.) **P. D. A. Div.—Re-translation of Will.**—Testator died in Mexico leaving a will in English, duly executed according to the laws of Mexico, where he was domiciled; the will was translated into Spanish, and probate granted thereon in Mexico: and the Spanish translation being sent to this country, the Court admitted to probate a re-translation.—*In the goods of Rule*, 39 L.T. 123.

**Public Health:—**

- (v.) **C. A.—Local Authority—Verbal Contract—11 & 12 Vict., c. 63, s. 85; 38 & 39 Vict., c. 55, s. 173.**—Decision of Ex. Div. (see *Public Health* iii., p. 31) affirmed.—*Hunt v. Wimbledon Local Board*, 27 W.R. 123.

**Railway:—**

- (vi.) **Ct. of Commrs.**—*Authorized Tolls—Power to exceed.*—Whether a railway company carry as common carriers, or in any other capacity, they are bound not to exceed the authorized tolls.—*Aberdeen Commercial Co. v. Great Northern of Scotland Rail. Co.*, 39 L.T. 480.
- (vii.) **Ct. of Commrs.**—*Jurisdiction—Concurrent Action—Reference to Arbitration.*—A working agreement, made in pursuance of powers contained in a special act, contained an agreement to refer differences arising thereunder to arbitration: *Held* that a difference arising on such an agreement was within the jurisdiction of the Railway Commissioners, notwithstanding that a suit relating to the same matter was then in litigation in the ordinary Courts.—*Portpatrick Rail. Co. v. Caledonian Rail. Co.*, 39 L.T. 485.
- (viii.) **Ch. Div. V. C. B.**—*Construction of Bridge—Nuisance—Railways Clauses Act, 1845.*—A railway company constructed a bridge over a road so as to carry the metals over it at the height marked in the deposited plans, but not leaving the amount of headway required by the Railways Clauses Act: in order to provide this headway they lowered the road, and in consequence the road became habitually flooded: *Held* that the company must alter their bridge so as to give the necessary headway and keep the road at a proper level.—*Attorney-General v. Furness Rail. Co.*, 47 L.J. Ch. 776.
- (ix.) **Ex. Div.**—*Level Crossing—Catch of Gate—Injury to Cattle.*—*Held* that a railway company was not liable for injury caused to plaintiff's cow through coming in contact with a projecting iron fastening on the gatepost at a level crossing, over which the cow was being driven.—*Great Western Rail. Co. v. Davies*, 39 L.T. 475.
- (x.) **H. L.**—*Negligence—Evidence—Question for Jury.*—When a person is killed in crossing a railway at night by a train, the mere fact that at the point at which he crossed, the lights of the approaching train would have been clearly visible, is not such evidence of contributory negligence on his part as to justify the withdrawal of the case from the jury.—*Dublin and Wicklow Railway Co. v. Slattery*, L.R. 3 App. 1155; 39 L.T. 365; 27 W.R. 191.
- (xi.) **C. A.**—*Vendor's Lien—Injunction and Receiver before Judgment.*—When an unpaid vendor of land taken by a railway company, brings an action to enforce his lien, the Court will not grant an injunction or receiver against the company before judgment.—*Latimer v. Aylesbury and Buckingham Railway Co.*, L.R. 9 Ch. D. 385, 39 L.T. 460; 27 W.R. 141.

**Scotland, Law of:—**

- (ii.) **H. L.**—*Foreign Ship—Arrestment at Sea.*—An arrestment, *ad fundandum jurisdictionem*, being used against a foreign ship lying in Glasgow harbour, a second warrant of arrestment on dependence of action was given to the messenger-at-arms to execute, and he, finding the ship had sailed, pursued and overtook her in Scottish waters, and compelled her to come back to port: *Held* that the execution of the arrestment was illegal. Other arrestments were used against the vessel after she was brought back by parties acting in concert with the original arresters: *Held* that those arrestments must also be recalled.—*Borjesson v. Carlberg*, L.R. 3 App. 1316, 1322.
- (iii.) **H. L.**—*Riparian Proprietors—Common Rights of Fishing, &c.—Separate Lakes.*—Where two sheets of water were joined together by a narrow channel, the water in which was usually too shallow to float a boat: *Held* that they were so far separate lakes that the riparian proprietors on one of the sheets of water had no right of fowling, fishing, and boating on the other.—*Mackenzie v. Bankes*, L.R. 3 App. 1324.

- (iv.) **H. L.—Superior and Vassal—Feu-contract—Poor Rates—Road Assessments.**—By a feu-contract dated 1828, the superior bound himself to free the vassal of all cess land-tax, feu-duties, or other duties ministers' stipends and other public burdens due or that might become due out of the lands feued: *Held* that the superior was bound to relieve the vassal of the whole of the poor rates payable in respect of the lands and buildings thereon imposed by the Poor Law Amendment Act, 1845, but not of road assessments imposed by Local Acts after the date of the contract.—*Dunbar's Trustees v. British Fisheries Society*, L.R. 3 App. 1298.
- (v.) **H. L.—Will—Construction—Voting.**—Testator directed trustees to apply residue of his estate for the benefit of his neices and their children, in the following proportions: one-third to A. for life and her children in fee, one-third to B. for life and her children in fee, and one-third to C. D. and E. equally in life rent, and to their children equally among them *per stripes* in fee. And if A. and B. died without issue, then their shares should accrue to C. D. and E. and their children respectively in life rent and in fee equally among them *per stripes* as provided with respect to their own shares of the residue. A. and B. died without issue, C. died having one child married and of age, who died without issue before A. and B.: *Held* that the representatives of C.'s child were entitled to participate in the division of the fee of the two-thirds bequeathed to A. and B. for life.—*Taylor v. Graham*, L.R. 3 App. 1287.

#### Settlement :—

- (vi.) **C. A.—After-Acquired Property.**—*Held* that a covenant to settle wife's after-acquired property, did not apply to a fund to which she was entitled on the happening of the double contingency of her mother surviving her father, and herself surviving her mother, where the contingencies determined during the coverture, but there remained an outstanding life estate which did not determine till after wife's death.—*Re Mitchell's Trusts*, L.R. 9 Ch. D. 5; 48 L.J. Ch. 50.
- (vii.) **Ch. Div. V. C. B.—Rectification—Mistake—Evidence.**—Property of the intended wife was on her marriage settled on her for life for separate use without power of anticipation and remainder as she should by will appoint and in default of appointment to her next of kin: after death of husband, on the unsupported testimony of wife that it was intended only to protect the property during coverture, the settlement was ordered to be rectified so that property should be held in trust for wife, her executors, administrators, and assigns absolutely.—*Cook v. Fearn*, 48 L.J. Ch. 63; 39 L.T. 348; 27 W.R. 212.
- (viii.) **C. A.—Tenant for Life—Fines on Renewal.**—Property demised for a term determinable on the dropping of three lives, at a yearly rent, and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a fixed fine, was, subject to the lease, settled in strict settlement, giving the trustees powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into, so that the best rent should be reserved without taking any fine or premium: *Held* that the fines arising under the compulsory renewals belonged to the tenant for life.—*Brigstocke v. Brigstocke*, 47 L.J. Ch. 817.

#### Ship :—

- (xvii.) **Ex. Div.—Authority of Ship's Husband—Charter-party.**—A ship's husband cannot bind his owners by an agreement to cancel a charter-party, and pay a sum of money on the cancellation.—*Thomas v. Lewis*, L.R. 4 Ex. D. 18; 48 L.J. Ex. 7; 27 W.R. 11.
- (xviii.) **C. P. Div.—Bill of Lading—Excepted Perils—Negligent Stowage.**—A bill of lading provided that goods should be delivered in good con-

dition, the usual perils excepted, and also excepting injury or loss from any act or neglect in navigating the ship, it being agreed that the captain, officers, and crew of the ship, on the transmission of the goods, should be considered the servants of the consignee: *Held* that damage arising from negligent stowage was not within the exceptions.—*Hayne v. Culliford*, L.R. 3 C.P.D. 410; 47 L.J. C.P. 755; 39 L.T. 288.

- (xix.) **C. A.**—*Charter-party*.—Plaintiff and defendant agreed by charter-party that defendant's ship, after loading dead-weight at M. for defendant's benefit, should proceed to a first-class Spanish port, defined to mean a port at which a steamer with cargo from a foreign port could load without risk of detention by customs' authorities, and there load a cargo for plaintiff: the ship had on board, as plaintiff knew, goods which, by the Spanish Customs' regulations, prevented the ship from loading at the port of V., where she was ordered, and in consequence she was unable to load plaintiff's cargo: *Held* that plaintiff could not recover on action for breach of charter-party.—*Cunningham v. Dunn*, L.R. 3 C.P.D. 443; 48 L.J. C.P. 62.
- (xx.) **C. P. Div.**—*Charter-party—Primage*.—A charter-party provided that the charterer should ship a cargo at a certain freight per ton in full: and the master signed bills of lading making goods deliverable to order or assigns on payment of freight as per charter-party, with 5 per cent. primage: the master was paid a fixed salary by the owners, and was not entitled to retain the primage: *Held* that the indorsees of the bills of lading, who received the goods as charterer's agents, were not liable for primage.—*Caughey v. Gordon & Co.*, L.R. 3 C.P.D. 419; 27 W.R. 50.
- (xxi.) **P. D. A. Div.**—*Collision—Admission of Liability—Claim for less than £300—Costs*—31 & 32 Vict., c. 71, s. 9.—In an action for damage by collision defendants admitted liability, and the question of the amount by consent was referred to the registrar: the plaintiffs claimed £295, and the registrar awarded £200: on motion by plaintiff to condemn defendants in costs, it appearing that at the time of bringing the action the plaintiffs were liable to a claim for salvage: *Held* that the Court had jurisdiction to certify that the case was fit to be tried before it, but under the circumstances ordered that each party should bear his own costs of the reference.—*The Williamina*, L.R. 3 P.D. 97.
- (xxii.) **C. A.**—*Collision—Regulations*.—A vessel with wind free is bound to keep out of the way of another vessel overtaking her on the same tack and close-hauled.—*The Peckforton Castle*, 47 L.J. P.D.A. 69.
- (xxiii.) **P. D. A. Div.**—*Collision—Regulations for Preventing*—36 & 37 Vict., c. 85, s. 17; 37 & 38 Vict., c. 52, s. 1.—The Act 37 & 38 Vict., c. 52, prescribing additional regulations to be observed in a particular locality, is to be read as part of the regulations for preventing collisions at sea, so far as regards section 17 of the Merchant Shipping Act, 1873.—*The Lady Downshire*, 39 L.T. 236.
- (xxiv.) **P. D. A. Div.**—*Collision—Regulations for Preventing—Infringement*.—If an infringement of the Regulations for Preventing Collisions at Sea may possibly contribute to a collision, the vessel infringing the regulations will be found to blame under section 17 of the Merchant Shipping Act, 1873, notwithstanding such infringement was justifiable, unless it was necessary.—*The Tirzah*, 39 L.T. 547.
- (xxv.) **C. A.**—*Collision—Ship being Towed*.—When a ship is being towed by another in a sea where other ships are likely to be met, she ought to have means of immediately slipping or cutting the tow rope. The ship towing must keep a look-out for both ships.—*The Jane Bacon*, 27 W.R. 35.

- (xxvi.) **P. D. A. Div.**—*Co-ownership—Sale opposed by Majority of Co-owners*—24 Vict., c. 10, s. 8.—The Court has power to order sale of a vessel proceeded against in an action of co-ownership, though such sale is opposed by the majority of the co-owners.—*The Nelly Schneider*, L.R. 3 P.D. 152; 39 L.T. 360.
- (xxvii.) **C. A.**—*Salvage*.—Vessels belonging to the Board of Trade are not "Her Majesty's Ships," and salvage can be claimed in respect of services rendered by them without consent of the Admiralty.—*The Cybela*, 47 L.J. P.D.A. 86.
- (xxviii.) **P. D. A. Div.**—*Limitation of Liability—Recognised British Ship*—17 & 18 Vict., c. 104, ss. 19, 516; 25 & 26 Vict., c. 63, s. 54.—A vessel at the time of her launch, and before registration, is not a recognised British ship, and cannot avail herself of the limitation of liability created by section 54 of the Merchant Shipping Act, 1862, for damage done to another vessel.—*The Andalusian*, L.R. 3 P.D. 182; 47 L.J. P.D.A. 65; 39 L.T. 204; 27 W.R. 172.
- (xxix.) **P. D. A. Div.**—*Salvage—Apportionment*.—The vessel containing Cleopatra's Needle having been abandoned in a storm was picked up and brought into a Spanish port by the F. The judge estimated the value of the ship and obelisk at £25,000, and awarded £2,000 for salvage.—*The Cleopatra*, L.R. 3 P.D. 145; 47 L.J. P.D.A. 72.
- (xxx.) **P. D. A. Div.**—*Salvage—Infectious Disease*.—The loan of a navigator to a vessel in distress, by reason of her own navigator being incapacitated by an infectious disease, is a salvage service.—*The Skiblander*, 47 L.J. P.D.A. 84.

#### Solicitor:—

- (vi.) **C. P. Div.**—*Negligence—Damages*.—When a mortgagee agreed to make a further advance to the mortgagor on the additional security of a piece of land recently acquired by mortgagor, and the mortgagee's solicitor omitted to ascertain that a third person had an equitable charge for £46 on the additional piece of land, so that mortgagee on selling the property had to pay off this charge before he could convey: *Held* that the solicitor was liable for negligence and that the measure of damages was £46.—*Whiteman v. Hawkins*, L.R. 4 C.P.D. 13; 27 W.R. 262.

#### Trade Mark:—

- (vii.) **C. A.**—*Export Agent—Custom of Manchester*.—By an arrangement between the parties W. a manufacturer was to export goods to G. through R. as shipping agent, and goods were to bear a trade mark consisting in part of R.'s name and arms: afterwards W. discontinued exporting through R. and exported the goods through F. continuing to use the same trade mark but substituting F.'s name and arms for R.'s: R. also began to export other goods under the old mark: *Held* that neither W. nor R. had an exclusive right to the use of the trade mark.—*Robinson v. Finlay*, L.R. 9 Ch. D. 487; 39 L.T. 398.
- (viii.) **Ch. Div. F. J.**—*Infringement—Injunction—Delay—Statute of Limitations*.—The right asserted by a plaintiff seeking to restrain defendant from representing his business to be identical with the plaintiff's, being a legal right, mere delay on his part, short of the period imposed by the Statute of Limitations, will not affect his right to an injunction.—*Fullwood v. Fullwood*, L.R. 9 Ch. D. 176.

#### Trustee:—

- (vi.) **Ch. Div. M. R.**—*Breach of Trust—Separate Use of Married Woman—Payment of Dividend to Husband*.—The trustee of stock for the separate use of a married woman having transferred it into the joint names of her husband and herself, the husband for six years received the dividends,

when the trustee died, and the husband sold the stock and applied the proceeds to his own use : *Held* that the wife was entitled to recover as against her husband and the estate of the trustee, arrears of dividends which had accrued since the sale of the stock, and to have the fund replaced.—*Dixon v. Dixon*, L.R. 9 Ch. D. 587.

- (vii.) **C. H. Div. V. C. M.**—*Discretion of Trustees—Uncontrolled and Irresponsible.*—Where trustees of a settlement have power, if they should in their uncontrolled and irresponsible discretion think fit, to apply the income of trust funds to the support of either husband, or wife, or children of marriage, or any one or more of them, the Court will not, in the absence of *mala fides*, interfere with the exercise of their discretion.—*Tabor v. Brooks*, 39 L.T. 528.
- (viii.) **Ch. Div. M. R.**—*New Trustees—Lunatic out of Jurisdiction—Trustee Act, 1850, ss. 3, 6.*—A petition for the appointment of new trustees and a vesting order in the place of a trustee lunatic, and out of jurisdiction, need not be entitled in lunacy as well as chancery.—*Re Gardner's Trust*, L.R. 10 Ch. D. 29 ; 27 W.R. 164.
- (ix.) **Ch. Div. V. C. M.**—*New Trustees—Trustee out of Jurisdiction Appointed.*—A fund being left in trust for six women for life with remainder to their children respectively, one of them married a Canadian and had children who took vested remainders in the fund, and were Canadians, and her share of the fund was principally invested in Canadian securities. On the retirement of one trustee the Court appointed a Canadian trustee of her share jointly with the continuing trustees.—*Re Cunard's Trusts*, 27 W.R. 52.

**Vendor and Purchaser:—**

- (viii.) **Ch. Div. M. R.**—*Bare Trustee—Unpaid Vendor—38 & 39 Vict., c. 87, s. 48.*—*Held* that a vendor, who let the purchaser into possession before payment of purchase-money and execution of conveyance, was not a bare trustee within the meaning of section 48 of Land Transfer Act, 1875.—*Morgan v. Swansea Urban Authority*, L.R. 9 Ch. D. 582.
- (ix.) **Ch. Div. V. C. H.**—*Building Covenant—Right of Assignee.*—The owners of an estate sold adjoining land to defendant's predecessor in title, who covenanted with the owners, their heirs and assigns, not to build in a certain way: the owners afterwards sold the estate to plaintiff's predecessor in title but no reference was made to the restrictive covenant: *Held* that the plaintiff could not sue upon the covenant.—*Renals v. Coulshaw*, L.R. 9 Ch. D. 125 ; 48 L.J. Ch. 33.
- (x.) **Ex. Div.**—*Sale of Shares—Dividend declared after Sale and before Completion.*—Defendant sold shares in a company to plaintiffs, the purchase to be completed a week after date of sale. In the interval a dividend was declared at the ordinary half-yearly meeting of the shareholders: *Held* that the purchasers were entitled to the dividend.—*Blake v. Homersham*, L.R. 4 Ex. D. 24 ; 27 W.R. 171.
- (xi.) **Ch. Div. F. J.**—*Specific Performance—Vendor entitled only to part.*—Two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest: *Held* that specific performance with abatement might be made against the former.—*Horrocks v. Rigby*, L.R. 9 Ch. D. 180 ; 47 L.J. Ch. 800.
- (xii.) **C. A. Ireland.**—*Tenants in Common—Conveyance to same uses—Voluntary Conveyance—27 Eliz., c. 4.*—A conveyance by two tenants in common, settling the estate of each to the same uses, in pursuance of a previous agreement, constitutes a reciprocally valuable consideration, so as to take the conveyance out of 27 Eliz., c. 4, and renders the persons entitled thereunder purchasers from both settlors.—*Mullins v. Gilfoyle*, 39 L.T. 511.



**Warranty :—**

- (i.) **H. L.—Sale in Market—Animals—Disease.**—A sale in market of animals does not imply representation that they are free from contagious disease.—*Ward v. Hobbs*, 27 W.R. 114.

**Water :—**

- (i.) **C. A.—Riparian Owner—Negligence—Damage—Overflow of Water—Statutory Duty.**—A dock company were authorized by their special Act to make certain works, according to levels defined in plans which showed the retaining banks of a height of four feet above Trinity high-water mark. At one point their wall was several inches below high-water mark. An unusually high tide occurred of four feet five inches above high-water mark, and water flowed over the dock company's wall, and damaged plaintiff's premises: *Held* that independently of their statutory obligation to maintain their wall at four feet, the company were bound to maintain the wall at the height of four feet two inches, being the height of the rest of the river wall, and that they were liable for damages for negligence, but ought to have an opportunity of showing that the damage caused by the high tide and that due to their negligence ought to be apportioned.—*Nitrophosphate Manure Co. v. London and St. Katherine's Dock Co.*, L.R. 9 Ch. D. 503; 39 L.T. 433.

**Will :—**

- (xxxv.) **Ch. Div. M. R.—Charitable Bequest—Void Trust.**—Bequest of £500 to incumbent for time being of U. to apply income in keeping a grave in repair, and remainder of income for benefit of poor of U: *Held* that the whole of the income was applicable to the charity.—*Re Birkett*, L.R. 9 Ch. D. 577; 47 L.J. Ch. 846; 39 L.T. 418; 27 W.R. 164.
- (xxxvi.) **Ch. Div. V. C. H.—Construction—Admissibility of Subsequent Writing.**—Testator having by his will provided that his children should bring into hotchpot money advanced to them in his life-time: *Held* that letters written subsequently to date of will by testator modifying the effect of this provision were inadmissible as evidence.—*Smith v. Conder*, L.R. 9 Ch. D. 170; 47 L.J. Ch. 878; 27 W.R. 149.
- (xxxvii.) **C. A.—Construction—"Die Seized."**—Devise of realty, "of which I may be seized." Testatrix at her death was entitled to freeholds of which A. had taken wrongful possession: *Held* that these did not pass by the will.—*Leach v. Jay*, 9 Ch. D. 42; 47 L.J. Ch. 876; 39 L.T. 242; 27 W.R. 99.
- (xxxviii.) **Ch. Div. M. R.—Construction—Gift to Class.**—Testatrix gave £100 to each of the children of M. who should attain twenty-one: at testatrix's death M. had no children: *Held* that no after-born child could take.—*Rogers v. Mutch*, L.R. 10 Ch. D. 25; 27 W.R. 131.
- (xxxix.) **Ch. Div. V. C. M.—Construction—Gift to Children at 25—Remoteness.**—Testator gave a mixed fund to trustees on trust for such of children of A. and B. as should attain twenty-five. At testator's death A. and B. were living, A having three children who were twenty-five, and B. infant children: *Held* that the gift was not void for remoteness, and that the class was to be ascertained at testator's death.—*Picken v. Matthews*, 39 L.T. 531.
- (xl.) **Ch. Div. V. C. H.—Construction—Heirs—Next-of-Kin.**—Gift of real and personal property between five sisters for their lives, or till marriage, and direction that on death or marriage of all five the said property should be divided equally between testatrix's brothers and sisters then living, or their heirs: *Held* a good gift to all brothers and sisters living at the period of distribution, and to the heirs of such as were then dead, whether they died before the date of the will or not; but that a brother who died before testatrix was born was not included:

that as to personalty the word heirs was to be read as statutory next-of-kin, including widows, and that the next-of-kin of the brothers and sisters who pre-deceased testatrix must be ascertained at her death, and as to those who survived her at their respective deaths.—*Wingfield v. Wingfield*, L.R. 9 Ch. Div. 658; 47 L.J. Ch. 768; 39 L.T. 227.

- (xli.) **Ch. Div. M. R.**—*Construction—Heirs or Next-of-Kin—Personalty.*—Bequest of personalty to the heirs or next of kin of A. deceased: *Held* to be a gift to the statutory next-of-kin of A.—*Re Thompson's Trusts*, L.R. 9 Ch. D. 607.
- (xlii.) **C. H. Div. M. R.**—*Construction—Household Furniture—Fixtures.*—Gift of household furniture will not pass tenants' fixtures in testator's leasehold house.—*Finney v. Grice*, L.R. 10 Ch. D. 13; 27 W.R. 147.
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- (xliv.) **Ch. Div. V. C. B.**—*Construction—Rule in Shelly's Case—Personalty.*—Gift of freeholds and leaseholds to A. for life, then to trustees to pre-serve contingent remainders, then to sons of A. successively in tail, then to daughters of A., as tenants in common, with ultimate remainder to right heirs of A. for ever: *Held* that A. took an absolute interest in all the property on failure of the contingent remainders in tail.—*Comfort v. Brown*, 27 W.R. 226.
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# Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times  
Reports, and Weekly Reporter,

FOR FEBRUARY, MARCH, AND APRIL, 1879.\*

By HENRY M. KEARY, of Lincoln's Inn, Barrister-at-Law.

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## Administration:—

- (xiii.) **Ch. Div. F. J.**—*Co-Administrators—Sale to Husband of Administratrix.*—The husband of an administratrix is in a fiduciary position and cannot purchase from a co-administratrix without the consent of all the *cestui-que trusts*.—*Pepperell v. Chamberlain*, 27 W.R. 410.
- (xiv.) **Ch. Div. V. C. M.**—*Colonial Duties.*—A testator, domiciled in England, whose estate consisted partly of personalty in the Colony of Victoria, gave certain pecuniary legacies, and bequeathed the residue of his personalty to other persons: *Held* that the duties attaching in Victoria, and all expenses of realization were payable out of the general estate before distribution.—*Peter v. Sterling*, L.R. 10 Ch. D. 279; 27 W.R. 469.
- (xv.) **Ch. Div. V. C. H.**—*Executor—Retainer.*—Where, in an administration action, an executor appears on an application, when an order is made for a debtor to the estate to pay the amount of his debt into Court, the executor loses his right of retainer with regard to the sum so paid in.—*Richmond v. White*, 48 L.J. Ch. 248.
- (xvi.) **Ch. Div. M. R.**—*Executorship Expenses—Costs of Action.*—The term "executorship expenses" in a will, means the same as testamentary expenses, and will include costs of an administration action, payment of rent falling due after testator's death, and expenses of warehousing specific legacies.—*Sharp v. Lush*, L.R. 10 Ch. D. 468; 48 L.J. Ch. 231.
- (xvii.) **Ch. Div. M. R.**—*Mortgage—Different Securities—Appropriation.*—17 & 18 Vict., c. 113.—Testator had been in the habit of borrowing money from his bankers and depositing as securities stocks and shares: on obtaining a further advance, he deposited with the bankers titled deeds of a freehold property and a memorandum by which he charged the sum advanced on that property and agreed that the security was

\* Cases reported only in the *Law Times Reports* and *Weekly Reporter* for Saturday, 26th April, are postponed till the August Digest.

to cover any money due from time to time to the bankers : afterwards he obtained other advances and varied the stocks and shares held as securities. It appeared that he always treated the successive advances and deposits as forming one running account : *Held*, that the amount due to the bank on testator's death must be borne by the properties held by the bankers rateably to their respective values at testator's death.—*Leonino v. Leonino*, L.R. 10 Ch. D. 460 ; 48 L.J. Ch. 217 ; 27 W.R. 388.

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- (iv.) C. A.—*Reference by Consent—Award under £20—Costs*—30 & 31 Vict., c. 142, s. 5.—Where a cause has been referred by consent, and the order of reference leaves the costs of the reference and award in the discretion of the arbitrator, his control over the costs is not affected by the provisions of sec. 5 of County Courts Act, 1867.—*Galatti v. Wakefield*, 48 L.J. Ex. 70 ; 40 L.T. 80.

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- (iii.) Ch. Div. V. C. B.—*Guarantee—Continuing Security—Appropriation*.—A testator and other persons, directors of a company, gave two guarantees for £1,000 each to bankers, requesting them to accept their agent's bills to that amount. Bills drawn by the company's agent were accepted, and other payments in and drawings out were made subsequently by the company, and when testator died there was a balance of £1,600 due to the bank : *Held* that the guarantees were a continuing security, and that the bankers were entitled to prove against testator's estate for the £1,600 and 4 per cent. from his death, the other guarantors being unable to pay.—*Browning v. Baldwin*, 40 L.T. 248.

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- (lix.) C. A.—*Appeal—Creditor who has not Proved—Locus Standi*.—The Controller in Bankruptcy applied for an order that a trustee might pay £4,000 to the credit of the estate on the ground that by his neglect that amount had been lost. The application was refused, and a person claiming to be a creditor, but who had not proved, appealed : *Held* that he had no locus standi.—*Ex parte Ditton, Re Woods*, 27 W.R. 401.
- (lx.) C. J. B.—*Appeal from County Court—Time*.—*Semble* the County Court Judge has no power to enlarge the time for appealing to the Chief Judge.—*Re Albezette, Ex parte Smith*, 48 L.J. Bay. 18.
- (lxi.) C. J. B.—*Concealment of Property by Bankrupt—Leave to Prosecute—Costs*—32 & 33 Vict., c. 62, s. 11, sub.sec. 4.—A County Court Judge

having refused to order the trustee to prosecute debtors for offences under the Debtors' Act, the trustee prosecuted them and obtained a conviction. The Chief Judge made an order *nunc pro tunc* to prosecute, so that the costs of the prosecution might be allowed.—*Ex parte Priestly, Re Stanlake*, 48 L.J. Boy. 48; 39 L.T. 643; 27 W.R. 292.

- (lxii.) **C. A.**—*Contract for Sale before Adjudication—Subsequent Payment of Purchase-money.*—Pending bankruptcy proceedings, the debtor contracted to sell leaseholds, and received a deposit: after adjudication the purchaser, not having notice thereof, paid the balance of the purchase-money to the debtor, and was let into possession, but no assignment was executed: *Held* that the purchaser could not enforce specific performance against the trustee without paying him the balance of the purchase-money.—*Ex parte Rabbidge, Re Pooley*, 48 L.J. Boy. 15.
- (lxiii.) **C. A.**—*Contract for Sale—Bankruptcy of Purchaser.*—An unpaid vendor of goods has, in the event of the bankruptcy of the purchaser before delivery, the right to re-sell and prove in the bankruptcy for the deficiency, unless the trustee elects within a reasonable time to fulfil the contract, and tenders the price in cash.—*Ex parte Stapleton, Re Nathan*, 40 L.T. 14; 27 W.R. 327.
- (lxiv.) **C. A.**—*Equitable Assignment—Interest in Land—Statute of Frauds.*—Decision of C. J. B. (see *Bankruptcy* xlii., p. 46) affirmed on the ground that the direction to pay was revocable at any time, and that the rent assigned being an interest in land, parol evidence was not admissible.—*Ex parte Hall, Re Whitting*, 40 L.T. 179; 27 W.R. 385.
- (lxv.) **C. J. B.**—*Execution—Sale—9 & 10 Vict., c. 95, s. 106—Bankruptcy Act, 1869, s. 95, sub-sec. 3.*—An execution levied under a County Court judgment on the goods of a trader and sold by the bailiff by consent of both parties to an interpleader action, after notice to the execution creditor of an act of bankruptcy by trader upon which a subsequent adjudication was made, and before the expiration of the five days required by the County Courts Act, 1846, s. 106, is not a protected transaction within sec. 95, sub-sec. 3, of Bankruptcy Act, 1869.—*Ex parte Bulmer, Re Hughes*, 40 L.T. 40.
- (lxvi.) **C. J. B.**—*Fraudulent Conveyance—Mortgage of whole Property—13 Eliz., c. 5.*—An assignment by way of mortgage of the whole of the assignor's property to one person, although there is a present advance, is void under 13 Eliz., c. 5.—*Ex parte Games, Re Bamford*, 27 W.R. 492.
- (lxvii.) **C. A.**—*Insolvency—After-acquired Property—Death of Debtor.—5 & 6 Vict., c. 116, s. 9.*—An insolvent debtor presented his petition in 1859 under 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, and obtained his final order in 1861. In 1866 he became entitled to a share of some property and died the next year: *Held* that sec. 9 of 5 & 6 Vict., c. 116, did not apply to the case of a deceased insolvent, and that the proper remedy of the creditors was to bring an action for the administration of the debtor's estate.—*Ex parte Welchman, Re Hare*, 39 L.T. 45.
- (lxviii.) **C. A.**—*Interpleader—Fi. Fa.—Jurisdiction.—Bankruptcy Act, 1869, s. 65.*—The Court of Bankruptcy has jurisdiction to make an interpleader order in respect of goods seized under a *fi. fa.* issued by the Court.—*Ex parte Sheriff of Middlesex, Re Buck*, 48 L.J. Boy. 33; 39 L.T. 653; 27 W.R. 309.
- (lxix.) **C. A.**—*Liquidation—Discharge—Omission in Debtor's Statement.*—Decision of C. P. Div. (see *Bankruptcy* xvi., p. 4) affirmed.—*Elmslie v. Corrie*, 40 L.T. 150; 27 W.R. 279.
- (lxx.) **C. A.**—*Liquidation—Petition—Lunatic—Next Friend.*—A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition.—*Ex parte Cahen, Re Cahen*, L.R. 10 Ch. D. 183; 39 L.T. 645; 27 W.R. 387.

- (lxxi.) **C. J. B.**—*Liquidation—Removal of Trustee.*—A trustee in liquidation is entitled to notice of a meeting at which it is intended to propose a resolution to remove him from his office.—*Ex parte Wright, Re Bagnall*, 27 W.R. 476.
- (lxxii.) **C. A.**—*Liquidation—Rights of Crown—Extent Issued.*—An extent by the Crown subsequent to the filing of a liquidation petition and appointment of a receiver, but before appointment of trustee, is good against the trustee when appointed.—*Ex parte Postmaster-General, Re Bonham*, 40 L.T. 16; 27 W.R. 825.
- (lxxiii.) **C. A.**—*Money Demand—Jurisdiction.*—Decision of C. J. B. (see *Bankruptcy* xxi., p. 5) affirmed.—*Ex parte Musgrave, Re Wood*, L.R. 10 Ch. D. 94; 48 L.J. Bcy. 39; 39 L.T. 647; 27 W.R. 372.
- (lxxiv.) **C. A.**—*Mortgage of Possible Surplus—Rights of Mortgagees.*—A person to whom a bankrupt has assigned the possible surplus of his estate after paying creditors in full, to secure advances made since the bankruptcy, does not acquire any right to interfere in the administration of the estate, or under Bankruptcy Rules, 1870, r. 166, to have an alleged creditor examined as to his proof.—*Ex parte Sheffield, Re Austin*, L.R. 10 Ch. D. 434; 40 L.T. 15.
- (lxxv.) **C. A.**—*Order and Disposition—Commission Agent.*—Where a person truly describes himself as a manufacturer's agent the doctrine of reputed ownership is excluded as to property belonging to the manufacturers of whom he is agent.—*Ex parte Bright, Re Smith*, 39 L.T. 649; 27 W.R. 385.
- (lxxvi.) **C. A.**—*Order and Disposition—Goods on Sale or Return.*—Goods which in accordance with a trade custom, are left with a bankrupt on sale or return, are not in his disposition as reputed owner until he has exercised the option of keeping them.—*Ex parte Wingfield, Re Florence*, 40 L.T. 15; 27 W.R. 346.
- (lxxvii.) **C. A.**—*Proof—Abandoning Security—Committee of Lunatic—Proxy.*—W.'s partner having been found lunatic by inquisition, W. entered into an agreement with the committee (which was approved by the Court) to dissolve partnership, and pay part of what was due to the lunatic in cash, and give a bond for the balance. Before he had paid anything or given the bond, W. filed a liquidation petition, and the committee recovered judgment for the amount agreed to be paid in cash. The committee appointed a proxy who proved for the whole amount due, and voted for the liquidation: *Held* that the agreement was executory, and that W. had no right to deal with the partnership assets as his own: that the committee had no power to appoint a proxy or to abandon the lunatic's security without the consent of the Court.—*Ex parte Wood, Re Wright*, 39 L.T. 646; 27 W.R. 401.
- (lxxviii.) **C. A.**—*Proof—Costs of Action.*—H. deposited with a bank dock-warrants of goods as security for money borrowed, and afterwards became bankrupt, when it appeared that part of the goods belonged to J.: J. sued the bank and recovered judgment, which was affirmed on appeal. The bank having realized the securities: *Held* that they were entitled to prove in the bankruptcy for the difference between the amount paid to J., and that realized by the sale of his goods, and also for costs of the action, but not of the appeal.—*Ex parte Carr, Re Hofmann*, 27 W.R. 435.
- (lxxix.) **C. A.**—*Proof in Respect of Stolen Goods—Compounding Felony.*—Decision of C. J. B. (see *Bankruptcy* liii., p. 47) affirmed.—*Ex parte Ball, Re Shepherd*, 40 L.T. 141.
- (lxxx.) **Q. B. Div.**—*Set-off—Mutual Dealings—Partnership.*—On the liquidation of a partnership, defendants sought to set-off the amounts due for goods supplied to separate members of the firm, against goods received

from the firm; and the County Court Judge found that there was no agreement to make the firm liable for the debts of its members: *Held* that defendants were not entitled to set-off.—*Tyso v. Pettit*, 40 L.T. 132.

- (lxxxi.) **C. J. B.**—*Undischarged Bankrupt—Debt not Proved.*—A debtor was adjudicated bankrupt in 1871, and his bankruptcy closed in 1874, there being no assets. In 1878 he acquired large property: *Held* that a creditor whose debt was provable in bankruptcy, but not proved, on his afterwards proving his debt, was entitled to enforce it, subject to the rights of subsequent creditors.—*Ex parte Lancaster Banking Co., Re Westby*, 39 L.T. 673; 27 W.R. 292.

### Bill of Exchange:—

- (v.) **Ch. Div. M. R.**—*Equitable Assignment—Stamp*—33 & 34 Vict., c. 97, s. 48. —A debtor gave to the trustee under his father's will an unstamped document authorizing him to pay the creditor the sum of £140 out of moneys then or thereafter due to the debtor under the trusts of the will: *Held* that this was an equitable assignment and not a bill of exchange within sec. 48 of Stamp Act, 1870.—*Fisher v. Calvert*, 27 W.R. 301.

### Bill of Sale:—

- (x.) **C. A.**—*Construction—Power to take Possession—Reputed Ownership.*—A bill of sale of chattels empowered the grantee to take possession in case the grantor should become embarrassed in his affairs or an action should be commenced against him: and it also provided that until default of payment it should be lawful for the grantor to retain possession: *Held*, that the prior clause was not controlled by the subsequent proviso, and that a friendly possession, if real, is sufficient to exclude the operation of reputed ownership clause in the Bankruptcy Act, 1869.—*Ex parte National Guardian Assurance Co., Re Francis*, L.R. 10 Ch. D. 408; 40 L.T. 237.
- (xi.) **C. J. B.**—*Prior Act of Bankruptcy—Seizure before Adjudication.*—A debtor having executed a bill of sale of all his goods for a past debt, next day executed another bill of sale to B. which was not registered: the debtor was subsequently adjudicated bankrupt: B., who had no notice of the first bill, took possession before adjudication: *Held*, that B.'s title to the goods prevailed over that of the trustee in bankruptcy.—*Ex parte Cochrane, Re Cross, Ex parte Payne, Re do.*, 27 W.R. 368.
- (xii.) **C. J. B.**—*Unregistered Bill—Apparent Possession—Goods in Hands of Police.*—A person in custody on a criminal charge who executes a bill of sale, of goods of which the police have taken possession, is in the apparent possession of the goods within the Bills of Sale Act, 1854.—*Ex parte Newsham, Re Wood*, 40 L.T. 104.
- (xiii.) **Ex. Div.**—*Unregistered Bill—Sale of Furniture and Subsequent Letting—Purchase from Sheriff.*—A judgment debtor's furniture having been seized under a *fi. fa.*, his father-in-law bought it from the sheriff's officer taking a receipt for the money with an inventory attached: on the same day he let the furniture to the debtor under a written agreement, and the debtor continued in possession of it: *Held*, that the receipt did not require registration under the Bills of Sale Act, 1854.—*Woodgate v. Godfrey*, L.R. 4 Ex. D. 59; 48 L.J. Ex. 271.

### Canada, Law of:—

- (iv.) **P. C.**—*Possessory Action on Disturbance.*—The object of a possessory action on disturbance within Secs. 946, 947, 948 of the Civil Procedure Code of Lower Canada must be definite and certain, and the possession must be *une possession annuelle* and continuous, uninterrupted, peaceable, public, unequivocal, and *à titre de propriétaire*.—*De Gaspé v. Bessener*, L.R. 4 App. 135; 39 L.T. 550.

**Company:—**

- (xxxiv.) **Q. B. Div.**—*Acceptance of Shares—Posting of Letter.*—As soon as a letter of allotment in reply to an application for shares is posted, properly addressed to the applicant, the contract to take shares is complete.—*Household Fire Insurance Co. v. Grant*, 48 L.J., Q.B. 219.
- (xxxv.) **Ch. Div. V. C. M.**—*Action by Shareholder in Name of.*—An action having been begun by a shareholder in his own name and that of a company: the company afterwards went into voluntary liquidation, and the shareholders resolved by a large majority that the action should not be continued in the company's name. The Court ordered the company to be struck out as plaintiffs, and gave leave to add them as defendants.—*Silber Light Co. v. Silber*, 40 L.T. 96; 27 W.R. 427.
- (xxxvi.) **Ch. Div. M. R.**—*Debentures—Unregistered Mortgage—Companies Act, 1862, s. 43.*—Debentures of a company held by a director are not void as against general creditors on the ground that the deed mortgaging the company's property to trustees for the debenture-holders had not been registered.—*Re Globe New Patent Steel Co.*, 27 W.R. 424.
- (xxxvii.) **C. A.**—*Meeting—Voting—Poll.*—At meetings held under the Companies Act, 1862, the vote is first to be taken by a show of hands, and if a poll is demanded the votes will then be taken according to the number of shares held by each voter.—*Re Horbury Bridge Coal Co.*, 27 W.R. 433.
- (xxxviii.) **Ch. Div. V. C. M.**—*Mortgage—Borrowing for purposes of Business.*—A company having mortgaged all its undertaking to A., borrowed money from B., who knew of the mortgage, for the necessary purposes of its business, and assigned to him a debt due from C. On the winding-up: *Held* that the assignment to B. was good.—*Re Hamilton's Windsor Iron Works*, 39 L.T. 658; 27 W.R. 445.
- (xxxix.) **Q. B. Div.**—*Penalty—Non-Delivery of List of Members.*—On a summons against a company for not having forwarded to the Registrar a list of its members: *Held* that it was necessary for complainant to prove that the first ordinary general meeting had been held.—*Regina v. Newton*, 48 L.J. M.C. 77.
- (xl.) **Q. B. Div.**—*Promoter—Secret Agreement.*—The owner of a mine agreed with defendants, who were metal brokers, that if they would assist him to get the mine sold to a company, he would compensate them for the loss they would sustain on their commission, by giving them £5,000 in paid-up shares, such £5,000 to be included by the owner in the amount of his purchase-money. Defendants assisted in selling the mine to plaintiff company, and received from the owner shares which realized £6,000. The company did not know of defendants' agreement with the owner: *Held* that the jury were justified in finding that defendants were promoters, and that they were liable to refund to the company the amount received for the shares.—*Emma Silver Mining Co. v. Lewis*, 48 L.J. Q.B. 257; 40 L.T. 168.
- (xli.) **Ch. Div. M. R.**—*Unregistered Company—Illegal Association.*—Where more than twenty persons subscribed money upon trusts for investment by trustees, and division of the profits among the subscribers: *Held* that this was an association for gain within sec. 4 of the Companies Act, 1862, and not being registered was illegal, and the Court would therefore not administer the trusts thereof.—*Sykes v. Beadon*, 40 L.T. 243; 27 W.R. 464.
- (xlii.) **C. A.**—*Winding-up—Attachment of Debt—Secured Creditor.*—A creditor of a company who has obtained a garnishee order nisi against a debtor to the company, but does not serve the order on the debtor till after a winding-up petition is presented, is not a secured creditor within secs.



12 and 14 of the Bankruptcy Act, 1869, which provisions now apply to the winding-up of companies by virtue of sec. 10 of Judicature Act, 1875.—*Re Stanhope Collieries Co.*, 40 L.T. 204.

- (xliii.) **Ch. Div. V. C. B.**—*Winding-up—Contributory—Director's Qualification.*—The subscribers to the memorandum of association passed a resolution that the qualification of future directors should be the holding of 50 shares each, no qualification being required by the memorandum. R. subsequently became a director not knowing of the resolution, and as soon as he did know tried to get the resolutions rescinded and ultimately resigned: *Held* that R. could not be put on the list of contributories in respect of the fifty qualification shares.—*Re Patent Davit Co., Ranken's Case*, 39 L.T. 664.
- (xliv.) **Ch. Div. V. C. H.**—*Winding-up—Director—Mortgage to Firm.*—A firm, one of whose members was director of a company advanced money to the company on the security of a transfer of delivery warrants of iron, which were transferred to the director for the benefit of the firm, but the transaction was not entered on the register of mortgages: *Held*, on the winding-up, that the security was not forfeited.—*Re South Durham Iron Co., Smith's Case*, 40 L.T. 63.
- (xlv.) **Ch. Div. M. R.**—*Winding-up—Director—Promotion Money.*—*Held* on the winding-up of a company that where promotion money had been improperly paid, of which B. was cognisant, and he subsequently became a director, but did not try to recover the money, that he was not liable for wilful default or misfeasance under sec. 165 of Companies Act, 1862.—*Re Forest of Dean Coal Mining Co.*, L.R. 10 Ch. D. 450.
- (xlvi.) **C. A.**—*Winding-up—Director—Purchase of Shares at Discount—Evidence on Appeal.*—If a director of a company who is authorized to carry out an agreement by the company with a vendor, has received some of the shares given to the vendor as purchase-money at less than their value, the *onus* lies on him to show that he received such shares after the adoption of the agreement, and if he fail to show this, he will be liable to pay the difference between the amount paid to the vendor for the shares and their full nominal value. Fresh evidence as to the date of the purchase by the director not admitted on appeal.—*Weston's Case, Re West Jewell Mining Co.*, 40 L.T. 43; 27 W.R. 310.
- (xlvii.) **Ch. Div. M. R.**—*Winding-up—Petition—Costs.*—In order that a creditor appearing on a winding-up petition may be entitled to his costs, he must show a reasonable ground for appearing.—*Re Hull and County Bank*, L.R. 10 Ch. D. 130; 27 W.R. 377.
- (xlviii.) **Ch. Div. V. C. M.**—*Winding-up—Petition—Costs.*—Costs were given to a creditor who successfully opposed a petition by a shareholder to wind-up a company.—*Re Carnarvonshire Slate Co.*, 40 L.T. 35.
- (xlix.) **Ch. Div. V. C. M.**—*Winding-up—Petition by Shareholder.*—A shareholder who, at the hearing of a petition, tenders the amount of arrears due on his share, has a *locus standi*, and a fully paid-up shareholder in a limited company can present a petition to wind-up when he alleges that the company is insolvent in consequence of the fraud of directors, and that a sum will be recovered from the directors in the winding-up sufficient to give a surplus after payment of debts.—*Re Diamond Fuel Co.*, 39 L.T. 662; 27 W.R. 336.
- (l.) **Ch. Div. M. R.**—*Winding-up—Two Petitions—Priority.*—Where a winding-up order is made on two petitions, the advertisements of which appear in the same number of the *London Gazette*, the petitioner whose petition was first presented is entitled to the carriage of the order.—*Re Storforth Lane Colliery Co.*, L.R. 10 Ch. D. 487.



- (li.) **C. A.—Winding-up—Proof—Redeemable Annuity.**—A company granted an annuity with a right to repurchase the same for £6,500 on giving six months' notice: at the date of the winding-up no notice to repurchase had been given, nor was any given by the liquidator: *Held* that the grantee could only prove for £6,500.—*Ex parte Young and Garratt, Re British Nation Life Assurance Association*, 40 L.T. 83; 27 W.R. 443.
- (lii.) **C. A.—Winding-up Voluntarily—Petition for Compulsory Order.**—Where a voluntary winding-up had been duly resolved upon, and a petition for a compulsory winding-up was presented by a contributory: *Held* that, although great improprieties had taken place in the method of issuing shares, yet the Court could not order a compulsory winding-up or make a supervision order.—*Re The Gold Company*, 40 L.T. 5; 27 W.R. 341.

### Copyright:—

- (iv.) **Ch. Div. V. C. B.—Photograph—Engraving—5 & 6 Vict., c. 100, ss. 4, 5.**—An engraving made from a publicly sold photograph of an eminent person for the purpose of being copied on earthenware plates, is not a new and original design capable of protection under the Copyright of Designs Act.—*Adams v. Clementson*, 27 W.R. 379.

### County Court:—

- (ii.) **P. D. A. Div.—Appeal—Evidence.**—In an Admiralty appeal from a County Court, where there were no shorthand notes of evidence, or notes by the County Court Judge available, it was ordered that the appeal should be heard on *vivâ voce* evidence.—*The Confidence, The Susan Elizabeth*, 40 L.T. 201.
- (iii.) **C. P. Div.—Appeal—Extension of Time—38 & 39 Vict., c. 50, s. 6.**—No leave of the County Court or a judge will avail to extend the time for moving by way of appeal against a decision of a County Court beyond the time limited by Sec. 6 of the County Courts Act.—*Tennant v. Rawlings*, L.R. 4 C.P.D. 133.
- (iv.) **Q. B. Div.—Injunction—Committal for Disobedience—Judicature Act, 1873, s. 89.**—A County Court has power, in actions within its jurisdiction, to grant an injunction against a nuisance, and to commit to prison for disobedience thereof.—*Ex parte Martin*, L.R. 4 Q.B.D. 212; 27 W.R. 431.

### Crimes and Offences:—

- (xiv.) **Q. B. Div.—Adulteration—Sale to Inspector—Prejudice of Purchaser—38 & 39 Vict., c. 63.**—The offence, created by sec. 6 of the Sale of Food and Drugs Act, 1875, is committed by a sale to an inspector appointed under the Act, and buying for the purpose of analysis, if an ordinary customer, would have been prejudiced by such sale.—*Hoyle v. Hitchman*, 40 L.T. 252; 27 W.R. 487.
- (xv.) **Ex. Div.—False Imprisonment—Committal for Contempt—Detention beyond year—32 & 33 Vict., c. 62, s. 4.**—Where the warrant under which a person is committed to prison for contempt does not refer to the nature of the contempt, the gaoler is not bound to inquire whether the imprisonment is such as is limited by the provisions of the Debtors Act, 1869.—*Greaves v. Keene*, 40 L.T. 216; 27 W.R. 416.
- (xvi.) **C. P. Div.—Imprisonment for One Calendar Month.**—Plaintiff was sentenced by a magistrate to be imprisoned for one calendar month, and was taken into custody during the afternoon of the 31st of October: *Held* that the sentence did not expire till midnight on the 30th of November.—*Migotti v. Colville*, 48 L.J. M.C. 48.
- (xvii.) **C. C. R.—Uttering Counterfeit Coin—Coin filed at edges—24 & 25 Vict., c. 99, s. 9.**—A genuine sovereign had been fraudulently filed at the

edges so as to reduce the weight, and a new milling made to it: *Held* that it was a counterfeit coin within Sec. 9 of 24 & 25 Vict., c. 99.—*Regina v. Hermann*, 40 L.T. 268; 27 W.R. 475.

**Debtor and Creditor:—**

- (xii.) **Ch. Div. V. C. B.**—*Attachment of Debt—Foreign Attachment—Bankruptcy Act, 1869, s. 12.*—The creditor of a plaintiff in an action in the Chancery Division issued an attachment against him in the Lord Mayor's Court, and served the writ of attachment upon the defendant in the Chancery action, from whom plaintiff claimed a sum of money. Defendant paid the money into Court, and on an interpleader issue between the creditor and the plaintiff's trustee in liquidation: *Held* that the former was a creditor holding a security within Sec. 12 of the Bankruptcy Act, 1869.—*Levy v. Lovell*, 27 W.R. 428.
- (xiii.) **C. P. Div.**—*Attachment of Debt—Sum Paid into County Court.*—The proceeds of a judgment paid into a County Court are not attachable by means of a garnishee summons at the suit of a third person, as a debt due from the registrar of the Court to the judgment debtor.—*Dolphin v. Leyton*, L.R. 4 C.P.D. 130.
- (xiv.) **Ch. Div. M. R.**—*Equitable Assignment—Notice—Priority.*—A. assigned his equitable interest in a fund: no notice of the assignment was given to the trustees of the fund: A. died, and his executrix sold his interest to a purchaser for value without notice of the prior assignment, who gave notice of his purchase to the trustees: *Held*, that the second assignee was entitled to the fund.—*Re Freshfield, Durrant v. Freshfield*, 40 L.T. 57; 27 W.R. 375.
- (xv.) **C. A.**—*Stoppage in Transitu—Constructive Delivery.*—Goods were shipped on board a vessel chartered by the owners and consigned to M.: the bill of lading being made out in his name, he paying freight. When a part of the goods had been removed from the vessel, and the freight had not all been paid, the shippers gave notice to the master to stop unloading: *Held* that they had not lost their right of stoppage in transitu as to so much of the cargo as remained on the vessel.—*Ex parte Cooper, Re McLaren*, 40 L.J. 105.

**Defamation:—**

- (v.) **C. P. Div.**—*Libel—Pleading—Setting out words—Ord. 19, rr. 4, 24.*—In an action for libel or slander the defamatory words must be set out in the Statement of Claim.—*Harris v. Warre*, L.R. 4 C.P.D. 125; 27 W.R. 461.

**Easement:—**

- (vi.) **Ch. Div. V. C. H.**—*Light and Air—Agreement Signed by Licenses—2 & 3 Will 4, c. 71, s. 3.*—Defendant in an action for light and air set up a document dated in 1824, and signed only by K., plaintiff's predecessor in title, whereby K. declared that the windows, the subject of the present action, were put out by the leave of S. (defendant's predecessor in title), and that he would at any time at the request of S., his heirs, or assigns, block them up, and in the meantime he promised to pay S., his heirs, and assigns, the sum of sixpence a year: the rent had been paid up to 1859: *Held* that the agreement contained in the document was a good defence.—*Bewley v. Atkinson*, 27 W.R. 452.
- (vii.) **C. A.**—*Support—Presumption of Grant—Prescription.*—The right to support for buildings from adjoining land cannot be claimed under the Prescription Acts, but may be acquired by prescription at Common Law, or by presumption of a lost grant arising from twenty years' enjoyment, and such presumption cannot be rebutted by proof that no such grant was in fact ever made.—*Angus & Co. v. Dalton*, L.R. 4 Q.B.D. 162; 48 L.J. Q.B. 225.

**Ecclesiastical Law:—**

- (iv.) **C. A.**—*Ecclesiastical Commissioners—Land Vested in—Statute of Limitations*—3 & 4 Will. IV., c. 27, s. 2; 3 & 4 Vict., c. 113, s. 50. —When land annexed to a deanery becomes vested in the Ecclesiastical Commissioners by virtue of 3 & 4 Vict., c. 113, s. 50, their right of entry upon it is taken away by 3 & 4 Will. IV., c. 27, s. 2, when twenty years have elapsed without their obtaining possession.—*Ecclesiastical Commissioners v. Rowe*, L.R. 4 Q.B.D. 63; 48 L.J. Q.B. 152; 40 L.T. 119; 27 W.R. 373.
- (v.) **Q. B. Div.**—*Ecclesiastical Offence—Commission—Mandamus*—3 & 4 Vict., c. 86, s. 3.—A bishop having refused to issue a commission to inquire into a charge made against the rector of a parish in his diocese, under 3 & 4 Vict., c. 86, s. 3, on the grounds of the rector's age and high character, the opposition of the majority of his parishioners to the inquiry, and the usually abortive nature of such proceedings: *Held* that the bishop was not justified in his refusal, and mandamus issued to compel him to proceed.—*Regina v. Bishop of Oxford*, 40 L.T. 152.
- (vi.) **Q. B. Div.**—*Vestry Meeting—Summoning Authority*.—The vicar and churchwardens of a parish declined to enter on the notice paper of a vestry meeting a notice of motion by a parishioner that future meetings should be held at a particular hour: *Held* that the vicar and churchwardens had power to fix the time of each meeting, and therefore were justified in refusing to enter the notice.—*Regina v. Vicar of Tottenham*, 40 L.T. 255.

**Election:—**

- (v.) **Q. B. Div.**—*Guardians of Poor—Falsely Assuming to Act*—14 & 15 Vict., c. 105, s. 3.—Appellant called at a voter's house during his absence, placed the voter's initials against two of the candidates' names in his voting paper for the election of guardians of the poor, and signed his own name as witness to the voter's mark which he got another person to make. He had no authority to do this. It did not appear by whom the voting paper was given to the returning officer: *Held* that appellant could not be convicted for falsely assuming to act in the name or on behalf of a person entitled to vote.—*Bell v. Morson*, 40 L.T. 128.
- (vi.) **C. P. Div.**—*Parliament—County Vote—Notice of Objection—Description*—6 & 7 Vict., c. 18, s. 40; 28 & 29 Vict., c. 36, s. 6.—The nature of a county voter's interest was described in the third column of the register as freehold land: and in the fourth column his qualification was described as fifteen specified lots in the estate: the voter had parted with fourteen of the lots, but the remaining one was of sufficient qualifying value: notice of objection grounded on the third column was given: *Held* that the revising barrister ought not to have entertained an objection grounded on the misdescription of the qualification, and that he had power to amend the description in the fourth column.—*Smith v. Woolston*, L.R. 4 C.P.D. 73; 48 L.J. C.P. 84; 40 L.T. 198.
- (vii.) **C. P. Div.**—*Parliament—County Vote—Proof of Claim*.—Where the name of a person published in the list of claimants for a county is objected to, the revising barrister has only to consider whether the claimant is entitled to be on the list in respect of his qualification therein described, and is not to require proof of due notice of claim.—*Leonard v. Alloways*, 48 L.J. C.P. 81; 40 L.T. 197.

**Evidence:—**

- (vi.) **C. P. Div.**—*Declarations by Deceased Creditor*.—In an action to recover a debt due to the estate of a deceased person, a parol statement by him against his pecuniary interest is admissible.—*Watson v. Sandford*, 40 L.T. 39.

(vii.) **C. P. Div.**—*Declarations by Deceased Tenant for Life*.—A declaration by a deceased tenant for life is not admissible in evidence against a remainder man, unless it was accompanied by some act done by the tenant for life.—*Howe v. Malkin*, 40 L.T. 196; 27 W.R. 340.

(viii.) **C. P. Div.**—*Fraud by Company's Agent—Proof of Other Frauds*.—In an action against a company to recover a sum of money obtained by them through the frauds of their agent, committed with their knowledge, and for their benefit, evidence of similar frauds committed on other persons by the same agent, is admissible on behalf of the plaintiff.—*Blake v. Albion Life Assurance Society*, L.R. 4 C.P.D. 94; 48 L.J. C.P. 169; 40 L.T. 211; 27 W.R. 321.

#### Highway:—

(iv.) **Q. B. Div.**—*Furious Driving—Bicycle*—5 & 6 Will. IV., c. 50, s. 78.—Held that a person who rode a bicycle furiously and injured a passenger was driving a carriage within sec. 78 of the Highway Act, 1835.—*Taylor v. Goodwin*, 27 W.R. 489.

#### Husband and Wife:—

(xxi.) **C. P. Div.**—*Conveyance by Married Woman*—3 & 4 Will. IV., c. 74, s. 91; 20 & 21, Vict., c. 57, s. 1.—Where an order under 3 & 4 Will. IV., c. 74, s. 91, and 20 & 21 Vict., c. 57, s. 1, for the conveyance of a married woman's interest in property bequeathed to her, is obtained by fraud or concealment of material facts, the Court will set it aside.—*Ex parte Cockerell*, L.R. 4 C.P.D. 39; 27 W.R. 366.

(xxii.) **P. D. A. Div.**—*Divorce—Variation of Settlement*—41 & 42 Vict., c. 19, s. 3.—The Matrimonial Causes Act, 1878, s. 3, does not apply to cases where the decree for dissolution was made absolute before the Act came into operation.—*Yglesias v. Yglesias*, 40 L.T. 37; 27 W.R. 432.

(xxiii.) **P. D. A. Div.**—*Restitution of Conjugal Rights—Separation Deed*.—A deed of separation between husband and wife is not contrary to public policy, and may be so framed as to be a good answer to a suit for restitution of conjugal rights.—*Marshall v. Marshall*, 39 L.T. 640; 27 W.R. 399.

(xxiv.) **Ch. Div. V. C. M.**—*Separate Estate—Annuity Forfeitable on Assignment*.—The regulations of a fund established for the benefit of certain widows and children, provided that the pensions payable thereout should be forfeited on assignment. A widow entitled to a pension married again: Held that she was entitled to the pension as her separate property.—*Re Peacock's Trusts*, L.R. 10 Ch. D. 490; 39 L.T. 661.

(xxv.) **Q. B. Div.**—*Separate Estate—Right of Action*—33 & 34 Vict., c. 93, s. 11.—A married woman can maintain an action in her own name against a wrong-doer for her expulsion from a beerhouse in which she carried on business apart from her husband, and for loss of profits, stock-in-trade, and fixtures, which she had purchased with her separate earnings.—*Moore v. Robinson*, 48 L.J. Q.B. 156; 40 L.T. 99; 27 W.R. 312.

(xxvi.) **C. A.**—*Separate Trading—Debtor's Summons against Husband*.—A debtor's summons was issued against a husband in respect of debts incurred by his wife in carrying on a separate trade under her maiden name, the wife having absconded: Held that the summons must be dismissed with costs.—*Ex parte Shepherd, Re Shepherd*, 48 L.J. Bcy. 35; 39 L.T. 652; 27 W.R. 310.

(xxvii.) **Ch. Div. F. J.**—*Wife's Equity to Settlement—Power of Appointment*.—In a settlement made by the Court of property to which a married woman has an equity to a settlement, an exclusive power of appointment among children of the marriage will be given to her.—*Oliver v. Oliver*, 39 L.T. 563.

**Insurance:—**

- (ii.) **Ch. Div. M. R.**—*Life Insurance—Concealment of Material Fact.*—In a contract of life assurance the not fairly answering a question as to proposals made to other offices, is concealment of a material fact sufficient to avoid the contract.—*London Assurance Co. v. Mansel*, 27 W.R. 444.

**Landlord and Tenant:—**

- (xiv.) **Ex. Div.**—*Apportionment—Rent—Assignee of Term—33 & 34 Vict., c. 35.*—The Apportionment Act, 1870, enables a landlord to recover apportioned rent from an assignee of the term who has assigned over during a current quarter of the term.—*Swansea Bank v. Thomas*, 27 W.R. 491.
- (xv.) **C. A.**—*Building Agreement—Rent—Possession.*—A clause in a building agreement that until the lease is executed the intended lessee shall hold the land at the rent and subject to the conditions contained in the lease, creates a liability on the part of the lessee to pay the sum reserved by way of rent though no tenancy has actually existed.—*Adams v. Hagger*, 27 W.R. 402.
- (xvi.) **C. P. Div.**—*Distress—Injunction to Restrain—Judicature Act, 1873, s. 25, sub-s. 8.*—An injunction to restrain a landlord from exercising his legal right of distress will be granted only upon such terms and conditions as the Court shall think fit.—*Shaw v. Earl of Jersey*, L.R. 4 C.P.D. 120.
- (xvii.) **C. H.**—*Lease—Covenant for Quiet Enjoyment—Breach—Measure of Damages.*—In an action for damages for breach of a covenant for quiet enjoyment resulting from the lessor having previously granted a right of way to a third person over land let to plaintiff: *Held* that only the damage actually sustained at the time of issuing the writ could be taken into account: and that defendant was also liable to repay plaintiff the costs of an unsuccessful action for trespass against the grantee of the right of way.—*Child v. Stenning*, 27 W.R. 462.
- (xviii.) **Ch. Div. M. R.**—*Lease—Covenant not to Carry on Business—Hospital.*—The lease of a house contained a covenant not to carry on any trade or business, or to suffer any act or thing which might be or grow to the annoyance or injury of the neighbouring premises, which were dwelling houses: *Held* that the use of the house as a hospital for out-patients suffering from diseases of the throat and chest was a breach of the covenant.—*Bramwell v. Lacy*, 27 W.R. 463.
- (xix.) **Ex. Div.**—*Lease—Covenant to Repair.*—Premises were demised for a term of ninety-nine years, described in the lease as a parcel of land, together with the messuage and all other buildings thereafter to be erected, and an acre of land abutting on the said parcel: and the lease contained a covenant by the lessee to keep in repair the said messuage and buildings then built or to be built on the ground demised, or any part of it: *Held* that the covenant to repair extended to buildings erected on the acre of land subsequently to date of lease.—*Hudson v. Williams*, 39 L.T. 632.
- (xx.) **Q. B. Div.**—*Lease of Beer House—Imperilling License.*—S. took an assignment of the goodwill and stock-in-trade of a beer-house and a transfer of the license, and agreed not to do anything to imperil the license on pain of forfeiting the tenancy and fixtures: he then executed a declaration of trust in favour of plaintiff, a married woman living apart from her husband, and handed to her the license indorsed in blank. She carried on the business and S. went away to sea: *Held*, that S.'s absence did not cause the license to be imperilled so as to create a forfeiture.—*Moore v. Robinson*, 48 L.J. Q.B. 156.

- (xxi.) **C. A.**—*Property Tax—Deduction from Rent*—5 & 6 Vict., c. 35, ss. 60, 103. —An agreement that if tenant will continue to pay the full rent without deducting landlord's property-tax, landlord will repay him the amount of the tax, is not illegal. Decision of Q.B. Div. (L.R. 4 Q.B.D. 220; 48 L.J. Q.B. 277; 27 W.R. 395) affirmed.—*Lamb v. Brewster*, 27 W.R. 478.

**Lands Clauses Acts:—**

- (v.) **Ch. Div. F. J.**—*Re-investment—Costs—Different Companies.*—On petition for re-investment in land of a sum made up of four amounts, varying from £490 to £1,797, paid into Court by four respondents as purchase-moneys for lands taken compulsorily, the costs of re-investment were ordered to be borne by the respondents equally and of the *ad valorem* stamp rateably.—*Ex parte Governors of Christ's Hospital*, 27 W.R. 458.

**Lord Mayor's Court:—**

- (ii.) **Ex. Div.**—*Nonsuit in City of London Court—Subsequent action in Lord Mayor's Court.*—Where judgment of nonsuit had been given in an action brought by plaintiff in City of London Court: *Held* that this was a bar to a fresh action for the same cause in the Lord Mayor's Court.—*Davis v. Great Eastern Railway Co.*, 39 L.T. 635.

**Lunacy:—**

- (ii.) **C. A.**—*Appointment of Committee—Surrender of Lease.*—Where a lunatic was entitled to a lease for seven, fourteen, or twenty-one years, which it was desirable to surrender at the expiration of the seven years, and the intended committee's security could not be completed in time for notice to be given to determine the tenancy, the Court appointed the lunatic's wife committee of the lunatic's interest under the lease, and authorized her to give the notice.—*Re Lambert*, 40 L.T. 205.
- (iii.) **C. A.**—*Deceased Lunatic—Cost of Proceedings*—25 & 26 Vict., c. 86, s. 11.—Where costs have been properly incurred for the protection of a lunatic and his estate, the Court has jurisdiction to order such costs to be paid out of the lunatic's estate, though the lunatic has died before the appointment of a committee, and there are no funds in Court.—*Re Meares*, 48 L.J. Ch. 190; 40 L.T. 111; 27 W.R. 369.
- (iv.) **C. A.**—*Infant—Ward of Court—Jurisdiction.*—The High Court of Justice and the Lancaster Palatine Court have jurisdiction to entertain applications respecting infants wards of Court, though they may be of unsound mind.—*Re Edwards, McNeile v. Chambers*, 48 L.J. Ch. 233; 40 L.T. 113.

**Market:—**

- (ii.) **Q. B. Div.**—*Negligence—Duty of Owner of Market.*—The owners of a market for the sale of cattle erected some iron railings near the site in the market which plaintiff occupied and paid a toll for, which were of insufficient height, and in consequence, a cow of plaintiff's was killed: *Held* that plaintiff was entitled to recover damages.—*Lax v. Mayor of Darlington*, 48 L.J. Q.B. 143; 40 L.T. 64; 27 W.R. 338.

**Master and Servant:—**

- (iv.) **C. A.**—*Hiring—Contract not to be Performed within a Year—Statute of Frauds.*—Plaintiff entered defendant's service under a verbal contract for a year, to commence two days after the day on which the contract was made, and before the expiration of the year was dismissed: *Held* that the contract was within Sec. 4 of the Statute of Frauds, that no new contract could be implied, and that the principles of equity as to part performance were not to be extended to contracts of this nature.—*Brittain v. Fossiter*, 40 L.T. 240; 27 W.R. 432.



**Mines:—**

- (vi.) **P. C.**—*Injury to Neighbour's Land—Measure of Damages.*—In an action for injury to property by a mining company in the exercise of their rights: *Held* that in estimating the amount of compensation, the jury could properly consider the further injury which might result from the operations already carried out.—*Great Lasey Mining Co. v. Clague*, L.R. 4 App. 115; 27 W.R. 417.

**Mortgage:—**

- (xviii.) **Ch. Div. M. R.**—*Auctioneer Mortgages—Sale Commission.*—An auctioneer took an absolute assignment of chattels under a bill of sale by way of mortgage, and afterwards conducted the sale of the chattels by auction, under an agreement with another incumbrancer: *Held* that he was entitled to charge the usual commission on the sale.—*Miller v. Beal*, 27 W.R. 403.
- (xix.) **C. A.**—*Attornment Clause—Distress—Bills of Sale Act, 1854.*—A mortgage was executed in 1875 by a company to secure the balance of its account at a bank limited to £50,000, and the mortgagor attorned yearly tenant to the mortgagee, at the annual rent of £5,000: subsequently the mortgagees levied a distress, and seized chattels which realized less than £5,000: the deed was not registered as a bill of sale, and a winding-up order was made shortly afterwards: *Held* that the mortgagees were entitled to retain the proceeds of sale of the chattels.—*Re Stockton Ironworks Co.*, L.R. 10 Ch. D. 335; 40 L.T. 19; 27 W.R. 433.
- (xx.) **Ch. Div. V. C. B.**—*Mortgage of Trust Fund—Notice—Priority.*—A notice by an incumbrancer of a trust fund to the solicitor of the trustees of the fund is a good notice to the trustees.—*Saffron Walden Building Society v. Rayner*, 27 W.R. 449.
- (xxi.) **Ch. Div. V. C. M.**—*Trust for Sale—Express Trust of Surplus—Statute of Limitations.*—A mortgage, in the form of a trust for sale, contained a trust of the surplus proceeds for the mortgagor: the mortgagee entered and retained possession for 27 years without acknowledging the mortgagor's title: on the mortgagee's death, the trustees under his will sold and conveyed the property under the trust for sale, having previously consulted persons claiming under the mortgagor as second mortgagees, as to the mode of sale: *Held* that the trustees had acknowledged the title of the second mortgagees, and that there was a trust of the surplus proceeds, so as to prevent the operation of the statute of limitations against the mortgagor.—*Johnson v. Mounsey*, 40 L.T. 93; 27 W.R. 389.

**Municipal Law:—**

- (vi.) **Ch. Div. M. R.**—*Expenses of Opposing Bill in Parliament—5 & 6 Will. IV., c. 76, s. 92; 35 & 36 Vict., c. 91, s. 8.*—A municipal corporation may defray, out of the borough funds or rates, the expenses of opposing a Bill in Parliament attacking either their existence as a corporation, their property, or their rights and powers.—*Attorney-General v. Mayor of Brecon*, L.R. 10 Ch. D. 204; 43 L.J. Ch. 153; 40 L.T. 52; 27 W.R. 332.

**New South Wales, Law of:—**

- (i.) **P. C.**—*Mortgage—Notice to Pay—Excessive Demand.*—A notice under sec. 55 of (Colonial Statute) 26 Vict., No. 9, is not bad because it demands more than is due to the mortgagee.—*Campbell v. Commercial Banking Co.*, 40 L.T. 137.

**Parent and Child :—**

- (i.) **Ch. Div. M. R.**—*Advancement—Mother—Presumption.*—Where a mother makes a purchase or investment in the name of her child or in the joint names of herself and child, that does not afford the presumption of advancement.—*Bennet v. Bennet*, L.R. 10 Ch. D. 474.

**Partnership :—**

- (x.) **C. A.**—*Articles—Construction—Good-will.*—Partnership articles provided that on a partner ceasing to be a member, accounts should be adjusted by payment to him of the sum found due on taking a general account of the stock and other estate and effects of the partnership, when a fair valuation should be made of all the particulars in their nature susceptible of valuation: *Held* that the good-will ought not to be included in the valuation.—*Stewart v. Gladstone*, 40 L.T. 145.
- (xi.) **Ch. Div. V. C. H.**—*Contract—Express Stipulation against Partnership.*—Although a contract contains an express stipulation that it is not to be construed into a partnership, and is only to relate to the particular transaction contemplated, yet if it confers privileges and liabilities usually incident to partnership, as between the parties themselves and with respect to the particular transaction, an interest arises which by law enures as a partnership.—*Moore v. Davis*, 27 W.R. 335.
- (xii.) **C. A.**—*Dissolution—Sale of Business—Name of Firm.*—A partnership between Miss A. and Miss B. carried on under the name of A. and B. in London was dissolved by order of the Court, and the business sold to B. A. married C. and they started a similar business in Paris under name of A. and Co.: *Held* that B. could not be restrained by C. and A. from carrying on business under the style of A. and B.—*Levy v. Walker*, L.R. 10 Ch. D. 436; 39 L.T. 654; 27 W.R. 370.
- (xiii.) **C. A.**—*Loss from Partner's Negligence—Arbitration—Assent.*—T., the managing partner of a colliery, having received notice from an adjoining owner that the workings were being carried on beyond the boundary, continued to carry on the workings, and an action was commenced against him, which he referred to arbitration, and damages were assessed at £6,000: *Held* on an action by T. against the other partners, that though they did not know of the reference till after it was agreed upon, they had by their subsequent acts assented to it; but that T. having acted with gross negligence in continuing the workings after notice, and without consulting the other partners, the other partners were not liable to contribute.—*Thomas v. Atherton*, L.R. 10 Ch. D. 185; 40 L.T. 77.

**Patent :—**

- (v.) **P. C.**—*Notice of Objection—Evidence.*—It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to extension of letters patent without stating particulars of objections.—*Re Ball's Patent*, L.R. 4 App. 171; 27 W.R. 477.
- (vi.) **P. C.**—*Presumption of Inutility—Prolongation.*—Where the utility of a patent has not been tested by actual employment, the question to be considered on an application for prolongation is, whether the evidence is sufficient to rebut the presumption of its inutility arising from its non-use.—*Re Hughes' Patent*, L.R. 4 App. 174.
- (vii.) **Ch. Div. V. C. H.**—*Specification—Part not Novel.*—*Held* that a patent was bad for want of novelty, on the ground that the specification contained a claim for a part of the machine patented, which was not novel.—*Roberts v. Heywood*, 27 W.R. 454.



- (viii.) **Ch. Div. F. J.**—*Specification—Sufficiency*.—The specification must describe the invention fairly, and with reasonable precision, so as to enable an ordinary workman to manufacture the article without further assistance.—*Wegmann v. Corcoran*, 39 L.T. 563; 27 W.R. 357.

#### Poor Law :—

- (iv.) **Q. B. Div.**—*Rating Appeal—Arbitration—Assessment Committee—Costs*—25 & 26 Vict., c. 103, s. 20.—Where on a rating appeal a reference to arbitration was agreed upon, the agreement being expressed to be made between the appellants and the assessment committee on behalf of the guardians, and an award was made in favour of appellants, which directed the other party to pay costs: *Held* that an action would not lie against the assessment committee to recover such costs.—*Leicester Waterworks Co. v. Nuttall*, L.R. 4 Q.B.D. 18; 48 L.J. M.C. 41; 39 L.T. 624; 27 W.R. 364.

#### Power of Appointment :—

- (iii.) **Ch. Div. M. R.**—*Illusory Appointment*—11 Geo. IV., & 1 Will. IV., c. 46.—Since the passing of the Illusory Appointments Act, an appointment under a non-exclusive power of an entire fund amongst the objects and the survivors and survivor of them is valid.—*Re Capon's Trusts*, L.R. 10 Ch. D. 484; 27 W.R. 376.

#### Practice :—

- (cxxxvii.) **C. A.**—*Appeal—Parties—Costs—Shorthand Notes—Ord. 58, rr. 2, 3.*—A., B., and C., having jointly agreed to take certain shares in a company, were, on its winding-up, settled on the list of contributories in respect of such shares, and a sum of £310, which had previously been paid for them, was credited to A.: B. appealed, and served only the official liquidator. The Court held that the £310 ought to be credited to A., B., and C. generally, and made an order crediting B. with one-third of it. Costs of shorthand notes of evidence in the Court below will only be allowed on an appeal, when a case is made out for such allowance.—*Re Duchess of Westminster Silver Lead Ore Co.*, L.R. 10 Ch. D. 307.
- (cxxxviii.) **C. A.**—*Appeal—Special Case—Arbitration under Lands Clauses Act*—8 Vict., c. 18, s. 25.—An appeal lies to the Court of Appeal from a decision of a Divisional Court, on a special case submitted by an arbitrator appointed under Sec. 25 of Lands Clauses Act, 1845.—*Bidder v. North Staffordshire Rail Co.*, 48 L.J. Q.B. 248.
- (cxxxix.) **C. A.**—*Appeal—Time—Verdict of Judge—Ord. 39, r. 1a.*—Where in an action in the Chancery Division issues of fact are settled at the commencement of the trial, then the finding of the judge on the facts is an interlocutory order, whether delivered at the same time as his judgment or not; but if no definite issues are settled, the whole judgment and the finding of facts may be appealed from together.—*Lowe v. Lowe*, L.R. 10 Ch. D. 432; 40 L.T. 236; 27 W.R. 309.
- (cxxx.) **Ch. Div. V. C. M.**—*Attachment—Contempt—Untrue Copy of Order Delivered.*—An order was made ordering the father of an infant to deliver the infant to the mother. The order was entitled in the matter of the infant and of the Act 36 & 37 Vict., c. 12. The copy delivered to the father was entitled only in the matter of the Act, but had the surname of the infant endorsed outside. The father did not comply with the order: *Held* that the service was insufficient, and writ of attachment against the father set aside.—*Re Holt*, 40 L.T. 207; 27 W.R. 485.
- (cxxxi.) **Q. B. Div.**—*Attachment of Debt—Order to Pay Money.*—Ord. 42, r. 20; 45 r. 2.—Ord. 45, r. 2, applies only to judgments, and does not include an order of the Court for payment of money.—*Cremetti v. Crom*, 27 W.R. 411.

- (cxxxii.) **Q. B. Div.**—*Charging Order—Death of Judgment Debtor*—1 & 2 Vict., c. 110, ss. 14, 15.—An order charging stock under 1 & 2 Vict., c. 110, ss. 14, 15, cannot be made absolute where it appears that the judgment debtor was dead when the order *nisi* was obtained.—*Finney v. Hinde*, L.R. 4 Q.B.D. 102; 48 L.J. Q.B. 275; 40 L.T. 193; 27 W.R. 413.
- (cxxxiii.) **Ch. Div. V. C. B.**—*Claim in Chambers—Cross-examination before Special Examiner—Transfer into Court*.—On a claim in Chambers in an administration suit, a special examiner was appointed to hear the cross-examination of witnesses. Though the cross-examination was nearly completed, the further hearing of the matter was transferred into Court.—*Commercial Union Assurance Co. v. Uzielli*, 39 L.T. 665; 27 W.R. 356.
- (cxxxiv.) **Ch. Div. V. C. B.**—*Conduct of Action—Executor*.—Where an executor had commenced an action to recover moneys due to his testator's estate, the Court refused to deprive him of the conduct of the action at the instance of beneficiaries, though the action was against his own father.—*Longbourne v. Fisher*, 40 L.T. 124; 27 W.R. 405.
- (cxxxv.) **Ch. Div. M. R.**—*Costs—Administration Action—Attending Proceedings—Special Leave*.—A party served with notice of decree in an administration, who attends proceedings in Chambers under the common order of course without obtaining special leave, will not be entitled to costs, but may be ordered to pay extra costs occasioned by his attendance.—*Sharp v. Lush*, L.R. 10 Ch. D. 468; 48 L.J. Ch. 231.
- (cxxxvi.) **C. A.**—*Costs—Claim under £20—Contract*—30 & 31 Vict., c. 142, s. 5.—An action against carriers for non-delivery of goods from negligence is founded on contract within Sec. 5 of the County Courts Act, 1867.—*Fleming v. Manchester, Sheffield, and Lincoln Rail. Co.*, L.R. 4 Q.B.D. 81; 39 L.T. 555; 27 W.R. 481.
- (cxxxvii.) **Ch. Div. F. J.**—*Costs—Counter Claim*.—In a case in which both claim and counter-claim are dismissed with costs, the defendant has only to pay the sum by which the costs of proceedings have been increased by the counter-claim.—*Saner v. Bilton*, 27 W.R. 472.
- (cxxxviii.) **Q. B. Div.**—*Costs—Counter-Claim—Action Remitted to County Court—Alteration of Certificate*.—An action in which plaintiff claimed £50 and defendants counter-claimed £10 and paid £40 into Court was remitted to a County Court, and the registrar certified a verdict for the plaintiff for fifteen shillings: *Held* that the Court could alter the certificate by distributing the findings on the issues so far as to give defendant the costs of the counter-claim.—*Davidson v. Gray*, 40 L.T. 192.
- (cxxxix.) **Ex. Div.**—*Costs—Counter-Claim—General Costs*.—In an action and counter-claim a verdict was found for plaintiff for £90 on his claim, and for defendant for £15 on his counter-claim, and one shilling damages for detention of a book which the judge ordered to be returned, and assessed at £150 to ensure return. There was no counter-claim for detinue. The associate's certificate stated that the judge directed judgment to be entered for plaintiff for £75, and for defendant for the return of the book or £150 and one shilling damages: *Held* that plaintiff was entitled to general costs of the action, and defendant to costs of those issues on which he had succeeded.—*Halliman v. Price*, 27 W.R. 490.
- (cxli.) **C. A.**—*Costs—Higher or Lower Scale—Jurisdiction of Judge—Rules of Court (Costs)*, Ord. 6, r. 3.—A judge has no power to delegate to a master the authority given him by Rules of Supreme Court (Costs), Ord. 6, r. 3, with reference to allowing costs on higher or lower scale.—*Corticene Floor Covering Co. v. Tull*, 27 W.R. 373.
- (cxli.) **C. A.**—*Costs—Interlocutory Proceedings*.—E. having been joined as a third party in an action, appealed against the order joining him, and his appeal was dismissed with costs, and at the trial he obtained a judgment

dismissing him from the action with costs against the party joining him, which order was affirmed on appeal: *Held* that the Court of Appeal had no power to alter their judgment on the interlocutory proceedings so as to give E. his costs of those proceedings.—*Beynon v. Godden*, 48 L.J. Ex. 80.

- (cxlii.) **Q. B. Div.**—*Costs—Payment into Court—Ord. 30, rr. 1, 2, 4.*—Where defendant pays money into Court under Ord. 30, rr. 1, 2, and plaintiff accepts the same in satisfaction but not within the time provided by r. 4, he loses his absolute right to all the costs, and must apply to the Court under Ord. 55, when the Judge will exercise his discretion as to any circumstances by which the defendant may have been prejudiced by the delay, allowing defendant costs properly incurred since the payment in.—*Greaves v. Fleming*, 27 W.R. 458.
- (cxliii.) **Ch. Div. M. R.**—*Costs—Petition under Statute—Discretion of Court, Ord. 55*—The effect of the Judicature Act, 1875, and Ord. 55, is to repeal all previous enactments directing costs to follow certain rules, and to give the Judges of the High Court discretion as to costs in all cases, including proceedings under previous statutes which are silent as to the costs of those proceedings.—*Ex parte Mercers' Co.*, L.R. 10 Ch. D. 481; 27 W.R. 424.
- (cxliv.) **C. A.**—*Counter-Claim—Discretion of Judge—Ord. 19, r. 3; 22, r. 9.*—The question whether a counter-claim shall be excluded is not so entirely in the discretion of the Judge as to preclude an appeal.—*Huggons v. Tweed*, L.R. 10 Ch. D. 359.
- (cxlv.) **Ex. Div. Ireland.**—*Counter-Claim—Slander.*—In an action for slander, defendant set up a counter-claim for damages in respect of slander spoken by plaintiff on a prior occasion to that on which the words complained of by plaintiff were uttered: *Held* that the counter-claim was good.—*Quin v. Hession*, 40 L.T. 70.
- (cxlvi.) **P. D. A. Div.**—*Default of Appearance—Action in Rem—Ord. 9, r. 10.*—In ordinary default causes *in rem* the times at which steps in the action may be taken date from the service of the writ of summons.—*The Maria*, 39 L.T. 549.
- (cxlvii.) **P. D. A. Div.**—*Discontinuance—Cross Cause—Substituted Service.*—A letter from plaintiff's solicitors to defendant's solicitors announcing that they were instructed to proceed no further with the action: *Held* a sufficient notice of discontinuance: after such notice it is not competent for the defendant to obtain substituted service of writ in a cross cause on the solicitor of the original plaintiff.—*The Pomerania*, 39 L.T. 642.
- (cxlviii.) **Q. B. Div.**—*Discontinuance—Ord. 23, r. 1.*—After an action had been referred to an arbitrator to state a special case, and he had found the facts with regard to all but a small part of the claim in defendant's favour, plaintiff applied for leave to discontinue the action: *Held* that leave ought not to be granted.—*Stahlschmidt v. Walford*, L.R. 4 Q.B.D. 217; 40 L.T. 194; 27 W.R. 412.
- (cxlix.) **Ch. Div. V. C. B.**—*Discovery—Affidavit of Documents—Attachment.*—Plaintiff having obtained an order for attachment of defendant for default in not filing an affidavit of documents, defendant filed an affidavit and obtained an *ex parte* order discharging his contempt: on motion by plaintiff the *ex parte* order was set aside on the ground that the affidavit was insufficient.—*Price v. Price*, 48 L.J. Ch. 215.
- (cl.) **Ch. Div. V. C. M.**—*Discovery—Affidavit of Documents—Lunatic Plaintiff—Ord. 31, r. 12.*—Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents by the next friend or by some one acquainted with the facts.—*Higginson v. Hall*, L.R. 10 Ch. D. 235; 48 L.J. Ch. 250; 39 L.T. 603; 27 W.R. 469.

- (cli.) **C. A.—Discovery—Affidavit of Document—Privilege—Ord. 31, r. 13.**—An affidavit as to documents by a party objecting to produce them is insufficient if it merely states that the documents are privileged; it ought to state and verify the facts upon which the objection is grounded.—*Gardiner v. Irvin*, L.R. 4 Ex. D. 49; 48 L.J. Ex. 223; 27 W.R. 442.
- (clii.) **Ch. Div. V. C. B.—Discovery—Inspection of Documents—Notice to Produce—Ord. 31, rr. 15, 17.**—Notice to produce documents referred to in a party's pleadings or affidavits must be in the form prescribed by Ord. 31, or an equivalent form, in order to entitle the applicant to an order for inspection under rule 17.—*Re The Credit Company*, 48 L.J. Ch. 221; 27 W.R. 380.
- (cliii.) **Q. B. Div.—Discovery—Interrogatories—Striking Out—Ord. 31, r. 5.**—Objections to particular interrogatories on the ground of irrelevance, or that they relate to the other party's evidence, must be taken in the affidavit, and do not afford ground for striking out the interrogatories.—*Gay v. Labouchere*, L.R. 4 Q.B.D. 206; 48 L.J. Q.B. 279; 27 W.R. 413.
- (cliv.) **Ch. Div. M. R.—District Registry—Motion in Chancery Division—Ord. 35, rr. 1, 4.**—A motion made in the Ch. Div. in an action begun in a district registry has the effect of removing such action to London.—*Dyson v. Pickles*, 27 W.R. 376.
- (clv.) **Ch. Div. V. C. B.—Evidence—Admitting after Reply—Patent Action.**—Further evidence of plaintiff admitted after reply, when defendants had gone into evidence on questions not raised on their pleadings.—*Adair v. Young*, 40 L.T. 61.
- (clvi.) **C. A.—Injunction—Interpleader Issue—Sale by Sheriff—Judicature Act, 1878, s. 24, sub-sec. 5.**—The sheriff being about to sell goods under an order in an interpleader issue directed between the trustee of a settlement and an execution creditor of the husband: the wife brought an action in the Chancery Div. against the creditor, the trustee, and the sheriff, claiming an injunction to restrain the sale: *Held* that the injunction was an order restraining proceedings in another division of the High Court, and was inconsistent with sec. 24, sub-sec. 5, of the Judicature Act, 1873.—*Wright v. Redgrave*, 40 L.T. 206.
- (clvii.) **C. A.—Interpleader—Claim for Part of Goods.—Held**, reversing the decision of C.P. Div. (*Practice* xl., p. 27), that the claimant was entitled to the amount paid into Court, and to the costs.—*Plummer v. Price*, 39, L.T. 657.
- (clviii.) **C. P. Div.—Interpleader—1 & 2 Will. IV., c. 58, s. 1.**—Defendant, the proprietor of a horse depository, sold there a horse belonging to A., to B., under conditions under which B. might, if he considered the horse unsound, return it within two days of sale, and refer the question of soundness to veterinary surgeons. B. accordingly returned the horse, and claimed the purchase-money. A. also claimed from defendant the proceeds of the sale: *Held* that defendant was not entitled to an interpleader order.—*Wright v. Freeman*, 48 L.J. C.P. 276; 40 L.T. 134.
- (clix.) **Ch. Div. V. C. H.—Motion for Decree—Admissions—Ord. 40, r. 11.**—On admissions in a statement of defence in an administration action, on notice of motion for a decree or decretal order, an order can be made under Ord. 40, r. 11, on motion without setting down the motion.—*Re Barker, Hetherington v. Longrigg*, L.R. 10 Ch. D. 162; 48 L.J. Ch. 171; 27 W.R. 393.
- (clx.) **C. A.—New Trial—Action Remitted to County Court—Ord. 39, r. 1.**—When an action in a Superior Court has been remitted to a County Court under 19 & 20 Vict., c. 108, s. 26, and tried by a judge without a jury, application for a new trial must be made to a Divisional Court, and not to the Court of Appeal.—*Davis v. Godbehere*, 27 W.R. 485.

- (clxi.) **Q. B. Div.**—*Parties—Adding Plaintiff—Consent—Ord. 16, r. 2.*—When an application is made under Ord. 16, r. 2, to add another person as plaintiff, the Court will require proof of the consent of such persons.—*Turquand v. Fearon*, 40 L.T. 191; 27 W.R. 896.
- (clxii.) **C. P. Div.**—*Parties—Substituting Plaintiff—Ord. 16, r. 2.*—Plaintiff company having paved roads under the control of the M. vestry, and being under a contract to keep them in repair, brought an action against defendants, alleging that they had injured the pavement, and thereby caused plaintiffs additional expense. An order was made substituting the M. vestry as plaintiffs without their consent.—*Val de Travers Asphalte Co. v. London Tramways Co.*, 40 L.T. 133.
- (clxiii.) **Ch. Div. V. C. M.**—*Payment into Court—District Registry—Receiver—35 & 36 Vict., c. 44.*—A receiver in a cause proceeding in a district registry having been ordered to pay balances into Court, paid them to the district registrar, who placed them to an account in his own name in the Liverpool branch of the Bank of England: *Held* that this was improper, and that the money must be paid into Court.—*Finlay v. Davis*, 39 L.T. 662; 27 W.R. 334, 352.
- (clxiv.) **Ch. Div. F. J.**—*Payment out—Person of Unsound Mind—Trustee Relief Act.*—Money to which a married woman, whose husband was of unsound mind not so found, was entitled, having been paid into Court, was ordered to be paid out on her separate receipt, she undertaking to apply it towards the maintenance of herself and her husband.—*Re Dixon's Trusts*, 40 L.T. 208.
- (clxv.) **Ch. Div. V. C. H.**—*Payment out of Court—Trustee Relief Act—Costs.*—A person presenting a petition for payment out of a sum in Court, under the provisions of the Trustee Relief Act, cannot object to pay the costs of the payment in, and of the appearance on the ground that the party, who paid the sum in, had no power to do so under those Acts.—*Re Sutton*, 27 W.R. 429.
- (clxvi.) **Ch. Div. M. R.**—*Payment out of Court—Trustee Relief Act—Service on Absent Parties.*—On a petition under the Trustee Relief Act for payment out of Court of a fund to which numerous parties were entitled, most of whom were not before the Court; a former order having directed inquiries necessary to ascertain the parties entitled, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, and of the former and present order, and of the certificate, upon the several persons named in the certificate, and that the petition stand over till such service had been effected.—*Re Battersby's Trusts*, L.R. 10 Ch. D. 228.
- (clxvii.) **H. L.**—*Pleading—Demurrer—Statute of Limitations.*—Where a defendant demurs to a statement of claim in an action for the recovery of real estate, he may raise the defence of the statute of limitations, although that is not the express ground of the demurrer.—*Dawkins v. Lord Penrhyn*, L.R. 4 App. 51; 39 L.T. 583; 27 W.R. 173.
- (clxviii.) **C. P. Div.**—*Pleading—Fraud—Amendment.*—Plaintiff claimed damages for fraudulent misrepresentation, whereby he was induced to receive bills drawn by N., in payment of purchase-money, which bills were dishonoured, and alleged that defendant undertook to discount the bills, but did not allege any consideration for this promise, nor specific damages for the breach of it: the jury found that defendant was not guilty of fraudulent representation, but that he had agreed to discount the bills: *Held* that defendant was entitled to judgment: leave to amend refused.—*Noad v. Murrow*, 40 L.T. 100.
- (clxix.) **C. P. Div.**—*Pleading—Matter of Law—Ord. 27, r. 1.*—Statements in a pleading which are not demurrers, but allege only matters of law that might be raised by demurrer, may be struck out as embarrassing.—*Stokes v. Grant*, L.R. 4 C.P.D. 25; 40 L.T. 36; 27 W.R. 397.

- (clxx.) **Ch. Div. V. C. B.**—*Pleading—Question between Co-Defendants—Judicature Act, 1873, s. 24, sub.s. 2—Ord. 16, r. 17.*—A. and B. having entered into an agreement with C. for working a mine, A. brought an action against B. and C., claiming to have the agreement cancelled, or for accounts: B. was out of the jurisdiction: after C. had delivered a defence and counter-claim, B. delivered a pleading, consisting of a statement of defence admitting the claim, a reply to the counter-claim and a claim against C. identical with A.'s: *Held*, on motion by B., that he was entitled to an order enabling him to obtain the relief claimed in this action.—*Bagot v. Easton* (2), 27 W.R. 404.
- (clxxi.) **Q. B. Div. Ireland.**—*Pleading—Recovery of Land—Statement of Claim.*—In an action for the recovery of land when plaintiff sets out a good title to the land, it is unnecessary for him to show under what title a defendant in possession claims.—*Hodgins v. Hickson*, 39 L.T. 644.
- (clxxii.) **C. P. Div. Ireland.**—*Pleading—Special Indorsement—Ord. 8, r. 6.*—In an action on a promissory note the writ set forth the note, but claimed only a portion of the amount for which it was drawn without stating specifically any credit given: *Held*, a good special indorsement: at defendant's request plaintiff was directed to serve a statement of claim.—*Hibernian Joint Stock Company v. Mc Donnell*, 39 L.T. 675.
- (clxxiii.) **C. A.**—*Pleading—Statement of Claim—Ejectment.*—Decision of Q.B. Div. (see *Practice* cxvii., p. 64) reversed.—*Phillips v. Phillips*, L.R. 4 Q.B.D. 127; 48 L.J. Q.B. 135; 39 L.T. 556; 27 W.R. 436.
- (clxxiv.) **Ex. Div. Ireland.**—*Pleading—Striking out—Ord. 19, rr. 17, 20, 22.*—A paragraph in the statement of defence in an action for breach of contract, whereby defendant denied the allegations in the statement of claim generally, and also a paragraph alleging that a sale by auction was not *bond fide*, because biddings had been made by a "puffer:" ordered to be struck out.—*Jones v. Quinn*, 40 L.T. 135.
- (clxxv.) **Q. B. Div.**—*Referee's Report—Application to Send Back.*—Where a referee has made his report, an application to send the case back to him should be made on notice of motion.—*Graves v. Taylor*, 27 W.R. 412.
- (clxxvi.) **Ex. Div.**—*Remitting Action to County Court—30 & 31 Vict., c. 142, s. 10.*—A Judge at chambers may properly decline to remit an action to a County Court, under sec. 10 of County Courts Act, 1867, without requiring an affidavit by plaintiff in answer to defendant's affidavit.—*Coxwell v. London General Omnibus Co.*, 27 W.R. 381.
- (clxxvii.) **Ch. Div. M. R.**—*Sale by Order of Court—Conduct—Advertising.*—Where the conduct of a sale directed by the Court has been given to one party, another party has no right to interfere by advertising the sale.—*Dean v. Wilson*, L.R. 10 Ch. D. 136; 48 L.J. Ch. 148; 27 W.R. 377.
- (clxxviii.) **C. A.**—*Second Action—Judgment obtained by Fraud—Jurisdiction.*—Where a defendant in an action has obtained judgment in his favour by means of fraud, it is doubtful whether plaintiff can on that ground bring a second action about the same matter.—*Flower v. Lloyd*, L.R. 10 Ch. D. 327; 39 L.T. 613.
- (clxxix.) **P. D. A. Div.**—*Sequestration—Pension for Past Services.*—Where under an order of the Court a party is liable to the payment of a sum of money, the Court will restrain him from receiving a pension due to him for past services, and will empower a third person to receive the pension, but will not make an order against the Paymaster-General to compel him to pay the pension to such third person.—*Sansom v. Sansom*, 39 L.T. 642.
- (clxxx.) **Q. B. Div.**—*Special Indorsement—Leave to Defend—Affidavit in Reply—Ord. 14, r. 8.*—When defendant has filed an affidavit for leave to defend under Order 14, r. 3, plaintiff has no right to file an affidavit by way of reply.—*North Central Waggon Co. v. North Wales Waggon Co.*, 39 L.T. 628.



- (clxxxi.) **Ev. Div.**—*Special Indorsement—Leave to Defend—Ord. 14, r. 1.*—Where application to sign judgment is made by plaintiff under Order 14, r. 1, and defendant by his affidavit admits part of the claim and discloses a defence as to the residue, the master has no power to make the leave to defend as to the residue conditional on payment to plaintiff of the part admitted to be due.—*Dennis v. Seymour*, 27 W.R. 475.
- (clxxxii.) **Ch. Div. V. C. H.**—*Tenant pur autre vie—Production of cestui que vie—6 Anne, c. 18.*—Where application is made under 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestui que vie*, and the party in possession does not respond, the applicant is entitled to an order for production.—*Re Owen*, L.R. 10 Ch. D. 166; 48 L.J. Ch. 248; 27 W.R. 305.
- (clxxxiii.) **Ch. Div. V. C. B.**—*Transfer of Action—Arbitration—Award made a Rule of Court—Ord. 51, r. 2a.*—A local board of health having a claim against a testator for non-repair of roads, made a demand on the tenant for life under the will and the executor, as statutory owners, for payment of the amount of the claim. The owners disputed their liability and the matter went to arbitration which the owners did not attend, and the award was made a rule of Court in the Q. B. Div. The testator's estate was being administered with Chancery Div.: *Held* that the Court had jurisdiction to transfer the award to the Chancery Division, but that the award was final, and the amount awarded a debt proveable in the administration.—*West v. Dowman*, 39 L.T. 666; 27 W.R. 355.
- (clxxxiv.) **Ex. Div. Ireland.**—*Transfer of Action—Recovery of Land—Counter claim for Specific Performance.*—In an action for the recovery of land on the expiration of a lease defendant set up a defence and counter-claim for specific performance of an alleged contract to grant a further lease: *Held* that the action ought to be transferred to the Chancery Division.—*Smyth v. Levinge*, 39 L.T. 579.
- (clxxxv.) **Ch. Div. V. C. M.**—*Transfer of Action—Winding-up of Company—Ord. 51, r. 2a.*—An application under Order 51, r. 2a, to transfer an action against a company in liquidation pending in another division to the Judge in whose Court the winding-up order has been made, may be made.—*Re Landore Siemens Steel Co.*, L.R. 10 Ch. D. 489; 40 L.T. 35; 27 W.R. 304.
- (clxxxvi.) **P. D. A. Div.**—*Transfer of Action—24 Vict., c. 10—Judicature Act, 1875, s. 11.*—An action assigned to the Admiralty Division, transferred to another division on the ground that it would not have been within the cognizance of the Court of Admiralty before the Judicature Acts.—*The Seaham*, 40 L.T. 38.
- (clxxxvii.) **Q. B. Div.**—*Trial by Jury—Finding on one point only—Motion for Judgment—Ord. 40, r. 10—39 & 40 Vict., c. 59, s. 17.*—The Judge before whom an action is tried may give judgment on a finding by the jury on one of the questions submitted to them, where they have been discharged without finding on the other questions.—*Emma Silver Mining Co. v. Lewis*, 48 L.J. Q.B. 257; 40 L.T. 168.
- (clxxxviii.) **Ch. Div. V. C. B.**—*Trial—Jury—Infringement of Patent—Ord. 36, rr. 3, 26.*—In an action for infringement of patent, where only one instance of infringement was alleged, plaintiff, after issue joined, gave notice of trial: *Held* that defendant was not entitled to have the action tried before a judge and jury.—*Spratt's Patent v. Ward & Co.*, 40 L.T. 250; 27 W.R. 470.
- (clxxxix.) **C. A.**—*Trial—Jury—Fraud—Ord. 36, rr. 3, 26.*—In an action in the Chancery Division to set aside an agreement on the ground of fraud, where plaintiff had given notice of trial by a judge and jury: *Held* that defendant was entitled to have the action tried without a jury.—*Ruston v. Tobin*, 40 L.T. 111.

- (exc.) **Ch. Div. V. C. B.**—*Trial—Jury—Ord. 36, r. 6.*—A plaintiff who has set down his action for trial before a judge of the Chancery Div. is not entitled to apply under Order 36, r. 6, for trial of an issue before a jury.—*Dent v. Sovereign Life Assurance Co.*, 27 W.R. 379.

**Principal and Agent:—**

- (xi.) **C. A.**—*Liability for Damage caused by Contractor.*—Where a contractor has been employed to do work in its nature dangerous to adjoining property, and damage results from the work, the employer is liable for the damage, though the contractor be competent and directed to use due precautions.—*Angus & Co. v. Dalton*, L.R. 4 Q.B.D. 162; 48 L.J. Q.B. 225.

**Probate:—**

- (viii.) **P. D. A. Div.**—*Execution—Attestation.*—The attesting witnesses proved that the blanks in a lithographed form of will were filled up in testator's hand-writing, and that they observed the testator's name, also in his hand-writing, in the attestation clause at the time that they signed the will, which they did in testator's presence, when he put his hand on the document and indicated that it was his will: the will was not otherwise signed by the testator. Probate was granted.—*In the goods of Claridge*, 39 L.T. 612.
- (ix.) **P. A. Div.**—*Execution—Naturalised Foreigner—7 & 8 Vict., c. 66, s. 6.*—An alien naturalised in 1858, under a certificate of the Secretary of State, conferring on him all the rights of a native born subject, except any rights and capacities of such a subject out of the British Dominions, executed a codicil to his will in Switzerland, valid according to the law of the place where it was made, but not duly executed according to English law: *Held* that it could not be admitted to probate in England.—*In the goods of Gatti*, 39 L.T. 639; 27 W.R. 323.
- (x.) **P. D. A. Div.**—*Testamentary Document—Deed of Gift.*—*Held* that a document purporting to be a deed of gift executed by deceased the day before his death, and which had no seal or stamp, was testamentary, in spite of declarations made by deceased of his intention not to make a will.—*Fielding v. Walshaw*, 40 L.T. 103; 27 W.R. 492.

**Public Health:—**

- (vi.) **C. A.**—*Borough Rate—Exemption by Local Act—35 & 36 Vict., c. 79; 37 & 38 Vict., c. 89; 38 & 39 Vict., c. 55.*—When a local Act contains a partial exemption in district rates for sanitary purposes in favour of lands occupied by a railway company, subsequent public Acts, dealing with the same subject, do not by implication take away this exemption.—*Regina v. Walsall Overseers*, L.R. 4 Q.B.D. 141; 40 L.T. 47; 27 W.R. 438; *Walsall Overseers v. L. & N. W. Railway Co.*, 48 L.J. M.C. 57.
- (vii.) **Ch. Div. F. J.**—*Sewer—Local Board—Power to make Side Entrance—11 & 12 Vict., c. 63.*—Part of plaintiff's land had been dedicated to the public, so as to form a street within the Public Health Act, 1848, but not so as to deprive the plaintiff of his ownership of the soil: *Held* that a local board had no power to construct in such a street, a man-hole communicating with their drains, without first purchasing the necessary land, or obtaining leave from plaintiff.—*Swanston v. Twickenham Local Board*, 40 L.T. 208.
- (viii.) **Ch. Div. V. C. M.**—*Sewer—Local Board—38 & 39 Vict., c. 55, s. 22.*—By an indenture, dated in 1874, it was agreed that the N. Local Board should allow the C. Local Board to cause one of their sewers to communicate with a sewer of the N. district, provided that the sewage



of any other districts should not be permitted by the C. Board to pass into their sewer: *Held* that the C. Board was discharged from this proviso by Sec. 22 of the Public Health Act, 1875.—*Newington Local Board v. Cottingham Local Board*, 48 L.J. Ch. 226; 40 L.T. 58.

- (ix.) **Q. B. Div.**—*Sewer—Nuisance*—38 & 39 Vict., c. 35, ss. 94, 96.—A sewer having been constructed under land of which appellant was lessee without his consent, he stopped up the sewer, and was in consequence convicted under Secs. 94, 96, of the Public Health Act, 1875, in respect of a nuisance caused by the stopping up, although no nuisance existed on his land: *Held* that the conviction was right.—*Riddell v. Spear*, 40 L.T. 180.

#### **Railway:—**

- (xii.) **C. A.**—*Arbitration under Special Act—Costs*—8 & 9 Vict., c. 18, s. 34.—A railway company's Special Act provided that the company might alter certain streets, paying compensation to the owners of adjoining houses or purchasing the houses; and in case of dispute, the compensation or purchase-money was to be assessed by a single arbitrator, to be appointed by the Board of Trade. There was no provision as to the costs of the arbitration, but the Act incorporated the Lands Clauses Consolidation Acts, unless expressly varied: *Held* that Sec. 34 of the Lands Clauses Act, 1845, applied to such an arbitration, and that the taxing of the costs was not a condition precedent to the right to bring an action to recover them.—*Sharpe v. Metropolitan Dist. Rail. Co.*, 27 W.R. 420.
- (xiii.) **Ex. Div.**—*Passenger—Season Ticket—Forfeiture of Deposit*.—Plaintiff on taking a season ticket to travel on defendants' line paid, besides the price of the ticket, a deposit of ten shillings, and signed conditions, one of which was, that if the ticket was not delivered up the day after expiry the deposit should be forfeited: *Held* that the condition was binding on plaintiff.—*Cooper v. London and Brighton Rail. Co.*, 27 W.R. 474.
- (xiv.) **C. A.**—*Passenger—Ticket—Penalty*—8 & 9 Vict., c. 20, ss. 109, 145.—Decision of C. P. Div. (see *Railway* iv., p. 32) affirmed, on the ground that the sum claimed under the bye-law did not constitute a debt recoverable in a court of civil jurisdiction.—*London and Brighton Rail. Co. v. Watson*, L.R. 4 C.P.D. 118; 40 L.T. 183.
- (xv.) **Ch. Div. M. R.**—*Right to Deal with Land*.—A railway company incorporated by Act of Parliament has not, in the absence of express enactment, power to alienate any portion of the land acquired by it for the purposes of its undertaking and not being superfluous land, or land acquired for extraordinary purposes.—*Mulliner v. Midland Rail. Co.*, 48 L.J. Ch. 258; 40 L.T. 121; 27 W.R. 330.

#### **Revenue:—**

- (ii.) **Ex. Div.**—*Income Tax—Slate Works*—5 & 6 Vict., c. 35, s. 60.—Slate works are assessable under 5 & 6 Vict., c. 35, s. 60, as quarries and not as mines, though all the workings be underground.—*Jones v. Cwmorthin Slate Co.*, 27 W.R. 431.
- (iii.) **Ex. Div.**—*Inhabited House Duty—Club*—48 Geo. III., c. 55, sch. B., No. 5.—A house was used as a working-men's club and was open all day till 10.30 p.m.: no one slept on the premises: *Held* not an inhabited house within the Inhabited House Duty Act.—*Riley v. Read*, 27 W.R. 414.

#### **Reversionary Interest:—**

- (i.) **Ch. Div. V. C. B.**—*Unconscionable Bargain—Mortgage—Arrears of Interest*.—Reversioners entitled on death of tenant for life to £1,500, mortgaged their reversion to secure £800 and interest at four per cent.

on £400, which latter sum was the amount actually advanced. At the time of executing the mortgage they were in very poor circumstances and had no independent legal advice. Only one instalment of interest was paid. On death of tenant for life the trustees paid the money into Court: *Held* on petition by reversioners, that the mortgage could only stand as security for the amount actually advanced and arrears of interest for six years.—*Re Slater's Trusts*, 40 L.T. 184; 27 W.R. 448.

**Scotland, Law of:—**

- (vi.) **H. L.**—*Superior and Vassal—Sub-division of Feu—Redemption of Casualties*—37 & 38 Vict., c. 94, ss. 4, 15.—Where part of a feu has been alienated, the casualties of superiority incident to that part may be redeemed separately under 37 & 38 Vict., c. 94, s. 15, without redeeming the casualties applicable to the entire feu.—*Edinburgh Magistrates v. Edinburgh Roperies Co.*, L.R. 4 App. 87.
- (vii.) **H. L.**—*Will—Construction—Interest on Legacies*.—Trustees were directed by a will to sell heritable estates of the testator as soon after his death as practicable and pay certain legacies. The sale being unavoidably postponed: *Held* that interest was due on the legacies from testator's death.—*Kirkpatrick v. Bedford*, L.R. 4 App. 96.

**Settled Estates Act:—**

- (iii.) **Ch. Div. M. R.**—*Petition for Sale—Contingent Remainder-man*.—Property stood limited to a testator in fee subject to a shifting clause in favour of A. in the event of testator's children dying without issue under twenty-one, and testator left four children, the eldest being twelve years old. On a petition by the trustees for a sale, which A. opposed: *Held* that A's interest was too remote to be considered.—*Re Spurway's Settled Estates*, L.R. 10 Ch. D. 230; 48 L.J. Ch. 213; 27 W.R. 302.
- (iv.) **Ch. Div. V. C. M.**—*Minerals—Surface*—19 & 20 Vict., c. 120, s. 33.—A lease of the minerals under land was made under the Settled Estates Act and part of the rents were set apart to be invested in the purchase of land. Testatrix, who had an absolute power of appointment, gave the surface of the land to one person and the minerals to another: *Held* that the money set aside for investment passed under the gift of the surface.—*Re Scarth*, L.R. 10 Ch. D. 499; 40 L.T. 184.

**Settlement:—**

- (ix.) **Ch. Div. F. J.**—*Construction—Next-of-Kin*.—By a marriage settlement money of the wife was settled in trust after her death, if her husband should survive her, and in default of appointment, for such persons as under the Statutes of Distribution would have become entitled thereto at her decease, had she died possessed thereof intestate and without having been married: *Held* that an only child of the wife was entitled to the trust fund.—*Re Ball's Settlement*, 27 W.R. 409.
- (x.) **C. A.**—*Voluntary Settlement—Leaseholds—Bankruptcy Act, 1869, s. 91*.—A trader within two years before his bankruptcy executed a post-nuptial settlement whereby he assigned to trustees for the benefit of his wife and children leaseholds subject to the rents and covenants contained in the lease: *Held* that the settlement was void as against the trustee in bankruptcy.—*Ex parte Hilmann, Re Pumfrey*, 40 L.T. 177.

**Ship:—**

- (xxxi.) **P. D. A. Div.**—*Arrest—Costs—Damage*.—Where the holder of a bottomry bond arrests the ship and freight on which the bond is secured before it is due, and the bond is paid at maturity, the shipowner is entitled to the costs occasioned by the arrest, but not to damages unless there is malice or gross negligence.—*The Endora*, 40 L.T. 166.

- (xxxii.) **C. A.**—*Bill of Lading—Demurrage*—18 & 19 Vict., c. 111, s. 1.—In the absence of express stipulation, it is an implied term in a bill of lading that the consignee, or his assigns, will take delivery of the goods within a reasonable time, and the assignee of the goods is subject to this liability: nor will the liability be affected by any express stipulation in the charter-party which is not incorporated in the bill of lading.—*Fowler v. Knoop*, 40 L.T. 180; 27 W.R. 299.
- (xxxiii.) **P. D. A. Div.**—*Bottomry Bond—Payment Due on Arrival*.—An instrument by which a captain binds his ship to pay a sum of money for goods supplied within six days after arrival, is an instrument of bottomry and means after the ship's arrival.—*The Cecilie*, 40 L.T. 200.
- (xxxiv.) **P. D. A. Div.**—*Charter-party—Seaworthiness—Damage to Cargo—Right to Sue*.—The ordinary warranty as to seaworthiness in a charter-party is a warranty that the ship is seaworthy at the time and likely to continue so on the voyage specified. An indorsee of a bill of lading can sue for damage to cargo arising from breach of a contract in the bill of lading, though he has, at the time of taking proceedings, sold the cargo.—*The Marathon*, 40 L.T. 163.
- (xxxv.) **C. A.**—*Contract to Supply Cargo—Void Tender*.—Plaintiff having contracted to supply defendant with a cargo under certain conditions and within a specified time, tendered a cargo which defendant refused, and on arbitration the refusal was held to be justified. Plaintiff then tendered within the specified time another cargo within the conditions, which defendants refused: *Held* that defendants were liable for damages arising from their non-acceptance of the second cargo.—*Borrowman v. Free*, 48 L.J. Q.B. 65; 40 L.T. 25.
- (xxxvi.) **P. D. A. Div.**—*Foreign Mail Packet—Arrest—Treaty by Crown*.—A vessel belonging to a foreign government and employed to carry mails and passengers is not entitled to the privileges of a man-of-war, but is liable to arrest in an action *in rem*, nor can the Crown by treaty with a foreign government give to such a vessel such privileges.—*The Parlement Belge*, 40 L.T. 222.
- (xxxvii.) **P. D. A. Div.**—*Foreign Ship of War—Arrest—Salvage*.—A foreign ship of war is not within the jurisdiction of a British municipal tribunal, and a warrant of arrest in an action of salvage *in rem*, cannot therefore be issued against it out of the Admiralty Division.—*The Constitution*, 48 L.J. P.D.A. 13; 40 L.T. 219.
- (xxxviii.) **C. P. Div.**—*Insurance—Fire Insurance—Declaration of Risk—Custom*.—*Held* that the custom that, in the case of open policies on ships to be declared, such policies attach to goods as soon as and in the order that they are shipped, and that a mistake in declaring the risks may be rectified after loss, applies to the case of a marine insurance company re-insuring with a fire insurance company, loss by fire only of goods insured by the former under successive open policies.—*Maritime Marine Insurance Co. v. Fire Re-Insurance Corporation*, 40 L.T. 166.
- (xxxix.) **C. A.**—*Insurance Against Loss of Freight—Deduction for Sea-Damage*.—Shipowners, who had entered into a charter-party, which provided for payment of a certain freight, and that if any part of the cargo should be delivered sea-damaged, the freight on such portion should be two-thirds of the specified rate, effected an insurance to cover only the one-third loss of freight in consequence of sea-damage: *Held* that the subject-matter of insurance was the one-third loss of freight, and not the whole freight.—*Griffiths v. Bramley-Moore*, L.R. 4 Q.B.D. 70; 48 L.J. Q.B. 201; 40 L.T. 149; 27 W.R. 480.
- (xl.) **P. D. A. Div.**—*Salvage—Rival Salvors—Tender—Consolidation*.—When separate suits were instituted for salvage services to a vessel and

crew by rival salvors, the Court refused to consolidate the actions, but allowed the defendant to make a single tender in respect of the whole services rendered.—*The Jacob Landstrom*, 40 L.T. 38.

**Solicitor:—**

- (vii.) **C. A.—Settled Account—Opening.**—A settled account between solicitor and client including arranged bills of costs, ordered to be opened nearly two years after settlement, on the ground of undue influence, excessive charges, and needless litigation.—*Watson v. Rodwell*, 48 L.J. Ch. 209; 39 L.T. 614; 27 W.R. 265.
- (viii.) **Ch. Div. V. C. H.—Lien—Mortgage—Solicitor Acting for Both Parties.**—The same solicitor having acted for both parties in the preparation of a trust deed to secure debentures of a company: *Held* that under the circumstances the trustees of the deed were not liable for the costs of the transaction, and that the solicitors could not withhold the deed from them upon a claim of lien.—*Re Mason and Taylor*, 48 L.J. Ch. 193; 27 W.R. 811.
- (ix.) **C. A.—Lien—Mortgage from Client.**—Where a solicitor advances money to his client on mortgage and prepares the mortgage deed, he prepares the deed on his own behalf, and therefore can have no lien on it for costs.—*Sheffield v. Eden*, L.R. 10 Ch. D. 291; 27 W.R. 477.
- (x.) **Ch. Div. V. C. B.—Lien—Retainer—Joint Defendants.**—In an action against a company and seven directors and the secretary, the defendants retained one solicitor and put in a joint defence: *Held* that the solicitor was not entitled to a lien on money in his hands belonging to the company, for the whole of the costs due to him, but only for the company's share.—*Re Allen. Davies v. Chatwood*, 40 L.T. 187; 27 W.R. 485.

**Trade Mark:—**

- (ix.) **Ch. Div. V. C. H.—Registration—Distinctiveness—Decision of Foreign Court—38 & 39 Vict., c. 91, s. 6.**—Registration of three trade marks refused on the ground of their similarity to other marks already registered, notwithstanding that the applicant had used the marks for several years without interference, and that a German Court of Appeal reversing the decision of an inferior Court, had permitted registration of one of the marks.—*Re Farina*, 27 W.R. 456.
- (x.) **Ch. Div. M. R.—Registration—Distinctiveness—New Mark—38 & 39 Vict., c. 91, s. 6.**—Registration of new trade mark for particular goods, refused on the ground that similar marks had already been registered for goods of the same class.—*Re Hargreaves*, 27 W.R. 450.

**Trustee:—**

- (x.) **Ch. Div. V. C. B.—Defaulting Trustee—Writ of Attachment—41 & 42 Vict., c. 54, s. 1.**—Where it is shown that imprisonment of a defaulting trustee will not be productive of payment, the Court will refuse an application for a writ of attachment.—*Barrett v. Hammond*, L.R. 10 Ch. D. 285; 48 L.J. Ch. 249; 27 W.R. 471.
- (xi.) **Ch. Div. V. C. M.—Defaulting Trustee—Writ of Attachment—41 & 42 Vict., c. 54, s. 1.**—Where a trustee had sold out trust funds and lent them to a *cestui que trust*, and was ordered to pay the amount into Court: the Court being satisfied that the trustee was unable to pay, refused an application for a writ of attachment.—*Street v. Hope*, 27 W.R. 470.
- (xii.) **C. A.—Lunatic Trustee—Vesting Order—13 & 14 Vict., c. 60, s. 5.**—The surviving trustee of a settlement having become of unsound mind, persons beneficially entitled to consols comprised in the settlement presented a petition in lunacy for an order vesting in them the right to

transfer the stock and receive the dividends: *Held*, that the petition ought to be presented in the Chancery Division as well as Lunacy.—*Re Currie*, 40 L.T. 110; 27 W.R. 369.

- (xiii.) **Ch. Div. F. J.**—*Maintenance—Discretion of Mother—Control of Court*—Legacy to trustees on trust for two infants on their attaining twenty-one, with a direction to the trustees to pay the income in the meantime to the mother of the infants, to be applied by her for their benefit at her discretion: *Held*, that the Court had power to control the discretion when not soundly exercised.—*Re Roper's Trust*, 40 L.T. 97; 27 W.R. 406.
- (xiv.) **C. A.**—*Maintenance Order—Infant—Succession Duty*—33 & 34 Vict., c. 93, s. 12; 37 & 38 Vict., c. 50.—Real and personal estate having been given to A. and B. in trust in remainder on the death of the life-tenant for the use of an infant: the life-tenant being dead, an Order of Court directed the trustees to pay the whole income to the guardian of the infant (who was a widow in poor circumstances) for maintenance: the trustees never paid succession duty: the widow's circumstances improved shortly after the order: A died in 1861, and the widow married first, in 1863, W., who died in 1872, and afterwards R.: *Held* that the order for payment of the whole income meant the whole net income after payment of succession duty: that subject to the succession duty it protected the trustees during their joint lives, but not after the marriage of the widow: that the trustees were liable for succession duty, but not for interest on it, and that W.'s liability in respect of his wife's receipts of income terminated with the coverture, and his estate was liable for payments from 1863 to 1872: and that R. was also protected by section 12 of 33 & 34 Vict., c. 93.—*Brown v. Smith*, L.R. 10 Ch. D. 377.

#### Vendor and Purchaser:—

- (xiii.) **Ch. Div. F. J.**—*Covenant with adjoining Owner—Lessee*.—The purchaser of land covenanted with the Vendor and with the owners of adjoining land not to carry on certain trades: *Held* that a lessee of part of the adjoining land was entitled to enforce the covenant.—*Tait v. Gosling*, 40 L.T. 251; 27 W.R. 394.
- (xiv.) **C. A.**—*Inquiry as to Incumbrances*.—The general requisition put to vendor's of land and their solicitors as to their knowledge of any incumbrances, &c., affecting the land sold, not disclosed in the abstract, is improper, and need not be answered.—*Re Ford and Hill*, L.R. 10 Ch. D. 365; 40 L.T. 41; 27 W.R. 371.
- (xv.) **Ch. Div. V. C. H.**—*Sale of Lease—Deficiency—Rescission—Notice*.—Contract for sale of a lease of a public-house for a term of twelve years. From the abstract it appeared that the lease was determinable by either party at the end of five years, and subject to an option for the lessor to resume possession of any part of the property on payment of compensation. The purchaser objected to complete, and having demanded back his deposit, brought an action to recover it before the day fixed for completion. The vendor offered by his defence for the first time to obtain a release of the lessor's options: *Held* that the objection to the lease was good, and the offer too late.—*Weston v. Savage*, 48 L.J. Ch. 239.
- (xvi.) **Ch. Div. V. C. B.**—*Voluntary Settlement—Power of Attorney—Defective Title*.—B. executed a voluntary settlement of land in favour of his wife and children, which contained a power of sale, and before leaving England executed a power of attorney to E. to sell all or any his lands in general terms: E. contracted to sell the settled land to plaintiffs, who objected to the title, and began an action for the return of the deposit and damages: in another action to administer the trusts of the settlement, an order was obtained confirming the proposed sale: *Held* that plaintiffs were entitled to their deposit and damages limited to the conveyancing costs.—*General Meat Supply Association v. Bouffler*, 40 L.T. 126.

**Victoria, Law of:—**

- (i.) **P. C.—Mortgage—Release of Equity of Redemption by Official Assignee.**—A release of an insolvent's equity of redemption to the mortgagee is within the scope of the authority of the official assignee, and an agreement not under seal by mortgagee to abstain from proving any portion of his debt, which agreement has been acted upon, is a good consideration for such release.—*Melbourne Banking Corporation v. Brougham*, L.R. 4 App. 156; 40 L.T. 1.

**Warranty:—**

- (ii.) **C. P. Div.—Sale of Meat—Implied Warranty—Latent Defect.**—A salesman who sells in a public market meat, which has no defect discoverable by ordinary inspection, to a purchaser who selects it himself, does not impliedly warrant that the meat is good: and is not liable to refund the price if it is afterwards found unfit for human food.—*Smith v. Baker*, 40 L.T. 261.

**Water:—**

- (ii.) **P. C.—Artificial Watercourse—Right to Flow of Water.**—When the overflow of water stored in a reservoir belonging to defendant had been allowed to flow along an artificial channel and irrigate plaintiff's land for a long period: *Held* that a right to have such overflow left unobstructed would be presumed in the plaintiff.—*Rameshaw Pershad Narain Singh v. Koonj Behari Pattuk*, L.R. 4 App. 121.
- (iii.) **Ex. Div.—Reservoir—Overflow—Via Major.**—Defendants were owners of a reservoir which was supplied with water by a main drain which did not belong to them, owing to obstruction in the drain below the reservoir, which obstruction was beyond defendants' control and without their knowledge, the water in the drain forced open the sluice gates and caused the reservoir to overflow into plaintiff's land: *Held* that defendants were not liable.—*Box v. Jubb*, 27 W.R. 415.
- (iv.) **C. P. Div.—Thames Navigation—Bye-Law—Towing Barges.**—*Held* that a bye-law which provided that six vessels and no more might be towed in a single line at a time was infringed by towing eight vessels at a time, four being in a single line, and the last four lashed together in pairs.—*Gadney v. Rough*, 40 L.T. 258.

**Will:—**

- (xlviii.) **Ch. Div. V. C. H.—Charitable Bequest—Marshalling—Mortmain—Particular Residue**—43 Geo. III., c. 108.—Testatrix, by a will executed more than three months before her death, gave a fund consisting of pure and impure personalty to trustees to sell and re-invest, and to pay thereout £2,000 to the Vicar of M. to be applied in his discretion in restoring and enlarging a church, parsonage house, and school, and as to the residue upon the trusts in the will expressed, and she gave to A. all the residue of her personal estate and effects: *Held* that the gift of £2,000 was good as to such of the objects already in mortmain, but failed as to the others: that the legacy must be apportioned between the pure and impure personalty, and so much as was payable out of pure personalty must be paid thereout, and so much as was payable out of impure must be paid up to the sum of £500 only: and that the legatees of the particular residue were entitled to so much of the legacy of £2,000 as failed.—*Champney v. Davy*, 40 L.T. 189; 27 W.R. 390.
- (xlix.) **Ch. Div. V. C. H.—Absolute Gift—Inconsistent Gift by Codicil.**—Testatrix having by her will given all her real and personal estate to X. absolutely, by a codicil after directing that it should be read as part of her will gave after the death of X. all her property which might then be remaining in manner therein mentioned: *Held* that X. took only a life estate.—*Bibbins v. Potter*, 27 W.R. 304.



- (i.) **H. L.—Construction—Double Legacy—Gift of Residue—Marginal Note.**—Testator gave to R. £2,000, and to each of R.'s brothers £1,000, and bequeathed a share of the residue to T., a brother of R.: *Held*, that T. was entitled to the legacy of £1,000 in addition to his share of residue. Testator wrote along the margin of his will opposite to legacies to servants, "all free of legacy duty:" *Held* that all the legacies given by the will were free of legacy duty.—*Kirkpatrick v. Bedford*, L.R. 4 App. 96.
- (ii.) **Ch. Div. V. C. H.—Construction—Eldest Son.**—Devise to trustees to use of E. for life, remainder to trustees to preserve contingent remainders, remainder to use of eldest son of E. for life, with remainder after decease of such eldest son to the use of the eldest son of his body and his heirs male for ever, in case of death of eldest son of E. without male issue, to the use of the second, third, and every other son of E., and of the heirs male of their bodies respectively: E.'s eldest son died after date of will, but in testator's life-time without issue: *Held* that E.'s second son took an estate tail.—*Meredith v. Treffery*, 27 W.R. 406.
- (lii.) **Ch. Div. V. C. H.—Equivocal Description—Evidence of Intention.**—Testatrix gave a legacy to the Treasurer of the Society for the Propagation of the Gospel among the Jews: there was no society with this exact name: *Held*, that evidence of intention was admissible, and the fact that as testatrix had subscribed on one occasion to the London Society for Promoting Christianity among the Jews, was sufficient to give that society a claim in preference to the British Society for the Propagation of the Gospel among the Jews.—*Re Fearn's Will*, 27 W.R. 392.
- (liii.) **Ch. Div. V. C. H.—Construction—Falsa Demonstratio.**—Bequest to "My niece, M. E. G." Testator had only one niece, E W.: M. E. G. was the wife of an illegitimate son of testator's wife: *Held* that M. E. G. was the person designated.—*Re Lyon's Trusts*, 48 L.J. Ch. 245.
- (liv.) **Ch. Div. M. R.—Construction—Gift of Personalty—Lawful Heirs.**—Bequest of personalty to children of A. during their lives, and on decease of either of them, his or her share to go to his or her lawful heir or heirs: *Held* that the heirs of the children were entitled in remainder.—*Smith v. Butcher*, L.R. 10 Ch. D. 113; 48 L.J. Ch. 136; 27 W.R. 281.
- (lv.) **Ch. Div. V. C. M.—Construction—Gift to Children of A.—Illegitimate Children—Extrinsic Evidence.**—Gift of stock to trustees to pay dividends to A. and his wife B. for their lives, and on death of survivor, the capital to be divided between all the children of A.: *Held* that illegitimate children were excluded, and that extrinsic evidence was not admissible to show what was the intention of the testatrix.—*Ellis v. Houstoun*, L.R. 10 Ch. D. 236.
- (lvi.) **Ch. Div. F. J.—Construction Gift to Heir—Persona Designata.**—Devise of lands to trustees in trust for A. for life, remainder in trust for A.'s eldest son for life, and upon death of such eldest son then in trust to convey to the right heirs male of A. and his heirs for ever: A. having died, leaving B. his eldest son and right heir surviving: *Held* that on A.'s death the estate became absolutely vested in B.—*Re Grayson's Will*, 4 L.T. 98.
- (lvii.) **Ch. Div. V. C. H.—Construction—Original or Substitutional Gift.**—Gift of real and personal estate to trustees upon trust for S. for life, and after her decease upon trust for all the children of S. who should be living at her death, provided that if any child should die in S.'s lifetime, having issue living at S.'s death, such issue should take the share which his or her parent would have taken if living at the death of S.: *Held* that children of a child of S., who was dead at date of will, were objects of the gift.—*Harris v. Harris*, 27 W.R. 429.

- (lviii.) **C. A.**—*Conversion—Failure of Trust*.—Where personal estate is bequeathed upon trust for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate.—*Curteis v. Wormald*, L.R. 10 Ch. D. 172; 40 L.T. 108; 27 W.R. 419.
- (lix.) **Ch. Div. V. C. H.**—*Conversion—Leaseholds—Breach of Trust by Married Woman*.—Testator left leaseholds and other property to his wife, if she married again to be settled to her separate use for life, and he bequeathed the money so settled to certain other persons: and he appointed the wife and two others executors and trustees: the widow married again and the leaseholds were not converted: *Held*, that they ought to have been converted, and that the second husband was liable for a breach of trust in permitting the wife to receive the entire income arising from them.—*Clifford v. Washington*, 48 L.J. Ch. 205.
- (lx.) **Ch. Div. V. C. H.**—*Joint Tenancy—Severance—Disposition by Mutual Agreement*.—Two joint tenants by a mutual agreement, made simultaneous wills giving their respective property to one another for life with identical remainders: one having died: *Held*, that the agreement and the will made a severance of the joint tenancy.—*Taylor v. Taylor*, 48 L.J. Ch 243; 27 W.R. 455.
- (lxi.) **Ex. Div.**—*Perpetuity—Gift to Building Fund of Institution—17 & 18 Vict., c. 112. ss. 30-33*.—*Held* that a bequest to the trustees of a mechanics' institution, established for providing a library and reading-room for its members, one of the rules of which provided that the society might be dissolved by resolution of its members, the bequest to go towards the building fund in connection with the institution, was void as tending to a perpetuity.—*Re Dutton*, L.R. 4 Ex. D. 54; 27 W.R. 398.
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# Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times  
Reports, and Weekly Reporter,

FOR MAY, JUNE, AND JULY, 1879.

By HENRY M. KEARY, of Lincoln's Inn, Barrister-at-Law.

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- (xix.) **C. A.**—*Sale of Goods—Divisible Contract.*—Plaintiffs contracted to sell to defendants about 25 tons (more or less) of pepper, October or November shipment from P. to London, per sailing vessel or vessels, name of vessels, marks, &c., to be declared to buyer within 60 days from date of bill of lading: *Held*, that the contract was an entire contract, and that the declaration of 20 tons by plaintiff within the sixty days, and of five tons after the expiration of the sixty days, was not a compliance with the terms of the contract.—*Reuter, Hufeland & Co. v. Sala & Co.*, 40 L.T. 476; 27 W.R. 631.

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- (lxxxv.) **C. J. B.**—*Bankrupt Mortgagor—Equitable Second Mortgages*.—The Court of Bankruptcy has no jurisdiction to restrain an equitable second mortgagee from bringing an action against the trustee in liquidation of the mortgagor and the first mortgagee, claiming a charge on the property and redemption against the first mortgagee and foreclosure.—*Ex parte Hirst, Re Wherly*, L.R. 11 Ch. D. 278; 27 W.R. 788.
- (lxxxvi.) **P. C.**—*Building Contract—Completion by Surety*.—A. contracted with appellant to execute certain buildings at an agreed price, and W. became surety for the performance of the contract by A.: it was provided by the contract that, if A. became bankrupt, the appellant might require W. to proceed with the work. A. having become bankrupt appellant gave notice to W. to proceed with the work, and W. completed it: *Held* that A.'s assignee in bankruptcy was entitled to sue for the price of the work completed by W.—*Cohen v. Sandeman*, 40 L.T. 870.
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- (lxxxviii.) **C. P. Div.**—*Composition—Omission of Debt—Waiver*.—Plaintiff having entered into a composition with his creditors, defendants, who were *del credere* agents of plaintiff, claimed to rank as creditors for £1,100 in respect of debts from plaintiff to merchants for goods sold to him through defendants, for which they were liable: plaintiff set down in his statement the debts as due to the merchants, and also set down defendants as creditors for another debt. Defendants tendered a proof for their debt of £1,100 which was admitted, and they resisted the resolution for and refused to accept the composition: *Held* that plaintiff had not complied with the provisions of sec. 126 of the Bankruptcy Act in respect of the debt of £1,100, and that defendants were not bound by the resolution of composition as to that debt.—*Oppenheim v. Jackson*, 48 L.J. O.P. 441.
- (lxxxix.) **C. A.**—*Fraudulent Conveyance—Mortgage of the Whole Property*—13 *Eliz.*, c. 5.—Decision of C. J. B. (see *Bankruptcy* lxvi., p. 77) reversed.—*Ex parte Games, Re Bamford*, 27 W.R. 744.
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- (xciv.) **C. A.**—*Liquidation—Description of Debtor*.—A farmer filed a liquidation petition, in which he described himself as a cattle-dealer: *Held*, that the description was not misleading so as to invalidate the liquidation resolutions.—*Ex parte Kirkwood, Re Mason*, 40 L.T. 566.
- (xcv.) **C. J. B.**—*Liquidation—Proof—Unendorsed Promissory Note*.—A *bonâ fide* holder for value of promissory notes, which were unendorsed at date of tender for proof, procured the endorsement before application to register the resolutions: *Held* that he was entitled to prove for his debt.—*Ex parte Pike, Re Eslick*, 40 L.T. 529.
- (xcvi.) **C. A.**—*Petitioning Creditor's Debt—Claim under Judge's Order*.—The defendant in an action on a bill of exchange, having become liable under a judge's order to pay £29, and in default to have judgment signed against him, tendered the £29, which plaintiff refused, unless defendant also paid another sum of £30, which plaintiff alleged to be due to him. Defendant having refused to pay this, plaintiff issued a debtor's summons for £59, and on defendant's failing to give security, presented a bankruptcy petition against him: *Held* that there was no sufficient debt to support the petition.—*Ex parte Astrup, Re Lefevre*, L.R. 11 Ch. D. 803; 40 L.T. 403; 27 W.R. 518.
- (xcvii.) **C. J. B.**—*Proof—Discounted Bills—Banker's Lien*.—Bankers, with whom bills of exchange have been deposited by a customer for discount, and who have made advances on them, are entitled, on the customer going into liquidation, to retain the bills and prove for the full amount, and receive dividends thereon, giving credit only for sums received from time to time in respect of such bills as may have been paid.—*Ex parte Schofield, Re Frith*, 40 L.T. 464.
- (xcviii.) **C. J. B.**—*Proof—Rejection—Delay*.—A trustee does not lose his right to reject a proof by allowing three months to elapse after it is sent in.—*Ex parte De Boos, Re Shallow*, 40 L.T. 659.
- (xcix.) **C. A.**—*Double Proof—Two Firms*.—The same individuals were associated in two firms, one in London and the other at Oporto. The Oporto firm drew bills on the London firm, which the latter accepted, and which were discounted by a Portuguese bank. Both firms having gone into liquidation, the bank received a dividend out of the assets in Portugal: *Held* that the bank could not prove in the English liquidation without bringing in what they had received from the Portuguese assets.—*Ex parte Banco di Portugal, Re Hooper*, L.R. 11 Ch. D. 317; 40 L.T. 406.
- (c.) **C. A.**—*Stoppage in Transitu*.—In a contract to deliver goods free on board, though no destination is mentioned, it is implied that they are

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- (vi.) **C. A.**—*Right to Securities held by Creditor.*—R., a member of a firm of R. and Co., deposited title deeds with the W. Bank as security for the floating balance due from his firm. Afterwards D. sold a cargo to R. and Co. who paid for it by a bill of exchange which D. indorsed and paid into the W. Bank. R. and Co. stopped payment before the bill became due: *Held* that D. was not entitled to have the security held by the bank handed over to him on payment of the balance due from R. and Co. to the bank.—*Duncan, Fox & Co. v. North and South Wales Bank*, L.R. 11 Ch. D. 88; 48 L.J. Ch. 376; 40 L.T. 371; 27 W.R. 521.

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- (liv.) **Ch. Div. V. C. B.**—*Winding-up—Contributory—Insurance Company.*—A life insurance company started a fire insurance business, and issued special shares appropriated to the liabilities of this business; on being wound up: *Held* that the liquidators ought to make calls on the past shareholders of the special shares in respect of fire liabilities before calling on the present ordinary shareholders.—*Bath's Case, Re Norwich Provident Insurance Society*, L.R. 11 Ch. D. 386; 48 L.J. Ch. 411; 40 L.T. 453; 27 W.R. 653.
- (lv.) **H. L.**—*Winding-up—Contributory—Fraud by Directors—Repudiating Shares.*—An unlimited bank having stopped payment, a general meeting of the shareholders was summoned and accountants were employed to examine the books and prepare a balance-sheet. The day after their report was issued to the shareholders, A., a shareholder, presented a petition for the removal of his name from the list of contributories on the ground of the fraud of the directors. The next day a voluntary winding-up was resolved upon: *Held* that A. was too late to repudiate his liability in the winding-up.—*Tennent v. City of Glasgow Bank*, 40 L.T. 694; 27 W.R. 649.
- (lvi.) **Ch. Div. F. J.**—*Winding-up—Contributory—Mutual Insurance Company.*—The articles of association of an unlimited insurance company, incorporated under the Companies Act, 1862, and having a share capital stated in the Memorandum of Association, provided for two classes of members, each having voting power, viz., shareholders and assurance members being life policy holders with profits. W. signed a proposal for assurance whereby she agreed that she would execute the articles of association when required. She was accepted and paid premiums but was never registered: *Held* on the winding-up of the company that she must be entered on the list of contributories.—*Winstone's Case, Re Albion Life Assurance Society*, 27 W.R. 752.
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- (lix.) **Ch. Div. V. C. H.**—*Winding-up—Distress for Rent—Judicature Act, 1875, s. 10.*—The bankruptcy law permitting distress for one year's arrears of rent has not, by virtue of sec. 10 of Judicature Act, 1875, superseded the old rule in winding-up.—*Re Bridgewater Engineering Co.*, 48 L.J. Ch. 389.
- (lx.) **C. A.**—*Winding-up—Mortgage—Foreclosure.*—In the winding-up of a company, in which an inquiry as to securities given by it had been directed, leave was given to a mortgagee who had obtained an order to attend proceedings in the winding-up, his costs of so doing to be costs in the winding-up, to bring such action as he might be advised to enforce his security on his undertaking that his costs of attending the winding-up proceedings should be in the discretion of the judge.—*Re Hamilton's Windsor Iron Works Co.*, 40 L.T. 569.
- (lxi.) **Ch. Div. F. J.**—*Winding-up—Payment of Debts—Execution Creditor—Judicature Act, 1875, s. 10.*—Where a winding-up petition has been presented, the Court will not allow a judgment creditor, who has been induced by representations of the company not to issue execution, to be deprived of the benefit which he would otherwise have obtained, and this principle is not affected by sec. 10 of the Judicature Act, 1875, and sec. 87 of the Bankruptcy Act, 1869.—*Ex parte Crawshaw, Re Richards & Co.*, 40 L.T. 315; 27 W.R. 530.

- (lxii.) **Ch. Div. F. J.**—*Winding-up—Proof—Costs of Special Act.*—A company's special Act provided that all costs and expenses incident to obtaining the Act should be paid by the company : *Held*, that a person who had done work towards obtaining the Act as a clerk to a promoter could not prove for his remuneration in the winding-up.—*Re Kent Tramways Co.*, 40 L.T. 393.
- (lxiii.) **C. A.**—*Winding-up—Petition—Paid-up Shareholder.*—A fully paid-up shareholder who presents a winding-up petition must allege and prove that there are assets of such an amount that there would be a substantial surplus on the winding-up. Vague allegations of fraud are not sufficient on a winding-up petition.—*Re Rica Gold Washing Co.*, L.R. 4 Ch. D. 36 ; 40 L.T. 531 ; 27 W.R. 715.
- (lxiv.) **Ch. Div. M. R.**—*Winding-up—Petition—Secured Creditor.*—Sec. 10 of the Judicature Act, 1875, does not affect the right of a secured creditor to present a winding-up petition, nor will he forfeit the benefit of his security by doing so.—*Moor v. Anglo-Italian Bank*, L.R. 10 Ch. D. 681 ; 40 L.T. 620 ; 27 W.R. 652.
- (lxv.) **Ch. Div. M. R.**—*Winding-up—Petition—Mortgage Bond.*—Mortgage bonds were issued by a railway company under the provisions of a deed whereby the company covenanted with trustees to pay them the interest on the bonds : *Held*, that a bondholder, on default of payment of interest, was not entitled to demand a winding-up order.—*Re Uruguay Central Railway Co.*, L.R. 11 Ch. D. 372 ; 27 W.R. 571.
- (lxvi.) **Ch. Div. M. R.**—*Winding-up—Reputed Ownership—Bankruptcy Act, 1869, sec. 15, sub-sec. 5.*—The provisions of the Bankruptcy Act as to goods and chattels of which a bankrupt is reputed owner, are not applicable to the winding-up of companies.—*Re Crumlin Viaduct Works Co.*, 27 W.R. 722.
- (lxvii.) **C. A.**—*Winding-up—Summoning Witnesses—Appeal—Companies Act, 1862, s. 115.*—There is no right of appeal on the part of any person summoned under sec. 115 of the Companies Act, 1862, as a mere witness.—*Re The Gold Company (2)*, 27 W.R. 757.
- (lxviii.) **C. A.**—*Winding-up Voluntarily—Arrangement with Creditors.*—When an honest arrangement has been come to between a company and its creditors, and the transaction is a beneficial one, it is not material in what order the assents required by the Companies Act, 1862, and the Joint Stock Companies Act, 1870, are given.—*Re Dynevor Duffryn, &c., Collieries Co.*, 48 L.J. Ch. 314 ; 40 L.T. 409 ; 27 W.R. 670.
- (lxix.) **C. A.**—*Winding-up Voluntarily—Compulsory Order.*—The Court has no jurisdiction to make an order for winding-up a company which has been voluntarily wound up and dissolved, unless the dissolution can be impeached on the ground of fraud.—*Re London and Caledonian Marine Insurance Co.*, L.R. 11 Ch. D. 140 ; 40 L.T. 666 ; 27 W.R. 713.

#### Copyright:—

- (v.) **Ch. Div. V. C. B.**—*Infringement—Title of Book.*—Plaintiff was in the habit of publishing directories, which he called Post Office directories, and was the registered proprietor of the "Post Office Directory of the West Riding of Yorkshire" : *Held*, that the publication of a directory by defendant, called the "Post Office Bradford Directory," was not an infringement of the copyright, nor of his trade-mark in the words "Post Office."—*Kelly v. Byles*, 40 L.T. 623.

#### Crimes and Offences:—

- (xviii.) **Q. B. Div.**—*Bastardy—Commencement of Act—35 & 36 Vict., c. 65, s. 3.*—An order may be made under sec. 3 of 35 & 36 Vict., c. 65, in respect of a child born at any time of the day on 10th August, 1872, when the Act received the Royal Assent.—*Tomlinson v. Bullock*, L.R. 4 Q.B.D. 230 ; 48 L.J. M.C. 95 ; 40 L.T. 459 ; 27 W.R. 552.

- (xix.) **Q. B. Div.**—*Bastardy—Marriage of Mother*—35 & 36 Vict., c. 65, s. 3.—No application can be made by the mother of a bastard under sec. 3 of 35 & 36 Vict., c. 65, when she has married since the birth of the child, and is, at the time of application, living with her husband.—*Stacey v. Lintell*, L.R. 4 Q.B.D. 291; 48 L.J. M.C. 108; 40 L.T. 553; 27 W.R. 551.
- (xx.) **Q. B. Div.**—*Chemist and Druggist—Corporation*—31 & 32 Vict., c. 121, ss. 1, 15.—The penalty imposed by secs. 1, 15, of the Pharmacy Act, 1868, may be recovered from a corporation for keeping a chemist's shop, though the business is managed by duly registered chemists.—*Pharmaceutical Society v. London Supply Association*, L.R. 4 Q.B.D. 313; 48 L.J. Q.B. 387; 40 L.T. 584; 27 W.R. 709.
- (xxi.) **Q. B. Div.**—*Elementary Education—Attendance Order—Second Non-Compliance—Proof*—39 & 40 Vict., c. 79, s. 12.—Upon summons for a second non-compliance with an attendance order, the first non-compliance may be proved by the production of the minute of the Court, made at the time of the adjudication thereon.—*London School Board v. Harvey*, 27 W.R. 783.
- (xxii.) **Q. B. Div.**—*Elementary Education—Factory Acts*—33 & 34 Vict., c. 75, s. 74.—A school board is not entitled to enforce the provisions of its bye-laws with regard to the hours of attendance at school, in the case of children employed in factories, who are attending efficient elementary schools, pursuant to the Factory Acts.—*Mellor v. Denham*, L.R. 4 Q.B.D. 241; 48 L.J. M.C. 113; 40 L.T. 395; 27 W.R. 505.
- (xxiii.) **C. A.**—*Imprisonment for One Calendar Month*.—Decision of C. P. Div. (see *Crimes and Offences* xvi., p. 82) affirmed.—*Migotti v. Colville*, 27 W.R. 744.
- (xxiv.) **C. C. R.**—*Perjury—Illegal Arrest—Jurisdiction of Justices*.—H., a police-constable, obtained an illegal warrant against S. for assaulting him, and arrested him thereon, and took him before magistrates in Petty Sessions, when S. was convicted: *Held* that H. might properly be convicted for perjury in respect of evidence given at the hearing at Sessions.—*Regina v. Hughes*, 40 L.T. 685.
- (xxv.) **C. A.**—*Sunday Profanation—Collusion*—21 Geo. III., c. 49.—Plaintiff brought an action against defendants for a penalty under 21 Geo. III., c. 49, for keeping open a place of amusement on Sunday, August 15th: subsequently, by arrangement, R. brought an action for penalties in respect of that and subsequent Sundays, and obtained judgment by default, having agreed not to enforce the judgment: *Held* that R.'s judgment could not affect the right of plaintiff.—*Girdlestone v. Brighton Aquarium Co.*, L.R. 4 Ex. D. 107; 48 L.J. Ex. 373; 40 L.T. 473; 27 W.R. 523.

#### Debtor and Creditor:—

- (xvi.) **C. A.**—*Absconding Debtor—Foreigner in England*—33 & 34 Vict., c. 76, s. 1.—A foreigner, a member of a firm carrying on business abroad, came to England to try and make arrangements with creditors of the firm, and such arrangements proving abortive, he was about to return home: *Held* that he was not liable to arrest as an absconding debtor.—*Ex parte Gutierrez, Re Gutierrez*, L.R. 11 Ch.D. 298; 40 L.T. 355; 27 W.R. 497.
- (xvii.) **Ex. Div.**—*Attachment of Debt—Money Payable to Preference Shareholders*.—Money due from the D. Railway Co. to the S. Railway Co., but payable as dividend by the latter (under an arrangement confirmed by Act of Parliament) to preference shareholders, who took their shares on the security of their dividends being so provided for, is attachable by a judgment creditor of the S. Company in the hands of the D. Company.—*Bouch v. Sevenoaks and Maidstone Rail. Co.*, L.R. 4 Ex.D. 133; 48 L.J. Ex. 338; 40 L.T. 560; 27 W.R. 507.

- (xviii.) **C. P. Div.—Tender—Refusal.**—Money payable as a composition in respect of costs due to a solicitor was tendered to a clerk in his office, who said that the solicitor was out and that he had no instructions, and refused the money: *Held* that the tender was good.—*Finch v. Boning*, L.R. 4 C.P.D. 143; 40 L.T. 484.

**Defamation:—**

- (vi.) **P. C.—Libel—Representation in Course of Business.**—*Held*, that an insurance society were not liable for damages to plaintiff, a master mariner, because they had refused to insure a ship if he was employed by the owner, they having acted on information, which they might reasonably believe to be true, that plaintiff was addicted to intemperance.—*Hamon v. Falle*, L.R. 4 App. 247.

**Easement:—**

- (viii.) **C. A.—Access of Air—Nuisance—Obstruction.**—Plaintiff and defendant occupied adjoining houses. For more than 20 years plaintiff had enjoyed the access of air to the chimneys of his house. Defendant took down his house and rebuilt it to a greater height, thereby causing plaintiff's chimneys to smoke: *Held* that no action would lie against defendant.—*Bryant v. Lefever*, L.R. 4 C.P.D. 172; 48 L.J. C.P. 380; 40 L.T. 579; 27 W.R. 612.
- (ix.) **H. L.—Right of Way—Inclosure—8 & 9 Vict., c. 118, ss. 16, 68.**—Decision of Court of Appeal (see *Easement* iii., p. 14) affirmed.—*Turner v. Crush*, L.R. 4 App. 221; 40 L.T. 661; 27 W.R. 553.
- (x.) **C. A.—Right of Way—Obstruction—Mandatory Injunction.**—Where, in spite of notice of plaintiff's claim to a right of way, defendant built over and obstructed it, a mandatory injunction was granted.—*Krehl v. Burrell*, L.R. 11 Ch. D. 146; 40 L.T. 637.
- (xi.) **Ch. Div. V. C. B.—Riparian Owner—Use of Water.**—*Held* that a railway company, whose line crossed a stream, was entitled to take a reasonable quantity of water from it for the company's purposes.—*Earl of Sandwich v. G. N. Rail. Co.*, L.R. 10 Ch. D. 707; 27 W.R. 616.

**Ecclesiastical Law:—**

- (vii.) **Arb. — Faculty — Chancel-Screen.**—A confirmatory faculty granted, authorizing the retention in a church of a chancel-screen, but directing that gates to it should be removed; and a faculty was also issued for the removal of steps under a communion table, and a wooden screen separating a transept from the rest of the Church.—*Bradford v. Fry*, L.R. 4 P.D. 93.
- (viii.) **Consist. Ct.—Faculty—Chancel-Screen.**—In these cases it was directed that no gates should be placed in the chancel-screens authorised to be erected.—*Re St. Augustine, Haggerstone*; *Vicar of Annunciation, Chislehurst v. Parishioners of do.*, L.R. 4 P.D. 111.
- (ix.) **Consist. Ct.—Faculty—Erection of Mortuary in Churchyard.**—*Held* that the Court had power to grant a faculty for the erection of a mortuary in a churchyard which had been closed for burials under an Order in Council.—*Hansard v. Parishioners of St. Matthew, Bethnal Green*, L.R. 4 P.D. 46.

**Election:—**

- (viii.) **C. P. Div.—Municipal Election—Infringement of Secrecy—35 & 36 Vict., c. 33, s. 4.**—A personating agent, during a municipal election, left his part of the burgess roll, in which he had marked the names of the voters who had obtained ballot papers, in the committee room of his candidate, but it was not shown that anyone looked into the roll or



obtained any information from it: *Held* that he could not be convicted under sec. 4 of the Ballot Act, 1872.—*Stananaught v. Hazeldine*, 48 L.J. M.C. 89; 40 L.T. 589; 27 W.R. 620.

#### Evidence:—

- (ix.) **Ch. Div. F. J.**—*Admissions*.—Where plaintiff had not himself given evidence in an action, defendant was allowed to put in letters by plaintiff to a third person, containing admissions which had not been pleaded.—*Stewart v. Gladstone*, L.R. 10 Ch. D. 626.
- (x.) **P. D. A. Div.**—*Privilege—Divorce Action*.—On the intervention of the Queen's Proctor in a divorce action, counsel on his behalf proposed to ask the petitioner's solicitor in a former trial, whether the petitioner had not confessed to him that he had been guilty of a matrimonial offence: *Held* that the question was inadmissible.—*Branford v. Branford*, L.R. 4 P.D. 72; 40 L.T. 659; 27 W.R. 691.

#### Friendly Society:—

- (i.) **Ch. Div. F. J.**—*Bank Appointed Treasurer*—38 & 39 Vict., c. 60, s. 15 (7).—The committee of management of a friendly society appointed as treasurer to the society a bank, incorporated under the Companies Acts. On the bank being wound up: *Held* that the society had no preferential right under sec. 15, sub-sec. 7, of the Friendly Societies Act, 1875, in respect of moneys received by the Bank as treasurers of the society.—*Ex parte Swansea Friendly Society, Re West of England and South Wales Bank*, 40 L.T. 551; 27 W.R. 596.

#### Highway:—

- (v.) **Q. B. Div.**—*Disused Toll-House*—3 Geo. IV., c. 126, s. 118; 4 Geo. IV., c. 95, s. 57.—Where a toll-house had ceased to be used as such since 1867, but was used as a dwelling-house for a man employed on the road: *Held* that an adjoining owner was entitled to call on the trustees of the road to remove the house.—*Regina v. The Greenlaw Turnpike Trustees*, 48 L.J. Q.B. 409; 40 L.T. 555; 27 W.R. 800.
- (vi.) **Q. B. Div.**—*Diversion—Justice's Certificate*—5 & 6 Will. IV., c. 50, ss. 85, 91.—Where justices certify that a new road will be more commodious than the one for which it is to be substituted, it must appear on the face of the certificate that they have arrived at that conclusion from their own personal inspection.—*Regina v. Wallace*, 40 L.T. 518.
- (vii.) **C. P. Div.**—*Locomotive*—28 & 29 Vict., c. 83, s. 3; 41 & 42 Vict., c. 77, s. 9.—*Held* that sec. 3 of 28 & 29 Vict., c. 83, as amended by 41 & 42 Vict., c. 77, s. 9, was duly complied with, where the person preceding the locomotive on foot was leading a horse and cart of his own.—*Davis v. Browne*, 48 L.J. M.C. 92; 40 L.T. 557.
- (viii.) **C. P. Div.**—*Obstruction*—5 & 6 Will. IV., c. 50, s. 72.—*Held* that a surveyor of highways who, in repairing a road, placed stones on it and allowed them to remain there at night insufficiently fenced and lighted, was properly convicted under sec. 72 of the Highway Act.—*Fearnley v. Ormsby*, L.R. 4 C.P.D. 136.
- (ix.) **Ch. Div. M. R.**—*Overhanging Trees—Owner*—5 & 6 Will. IV., c. 50, s. 65.—The word "owner," in sec. 65 of the Highways Act, means the person in actual occupation.—*Woodard v. Bellericay Highway Board*, L.R. 11 Ch. D. 214; 27 W.R. 593.
- (x.) **C. A.**—*Repair—Turnpike Trust*—11 & 12 Vict., c. 63, s. 144.—Decision of Q. B. Div. (see Highway ii., p. 15) reversed.—*Nutter v. Accrington Local Board*, L.R. 4 Q.B.D. 375.

- (xi.) **Ex. Div.—Turnpike Trust—Tolls—Omission to Demand.**—A Turnpike Act, passed in 1815, provided that no toll should be demanded of the inhabitants of the town of S. at any toll-gate to be erected in the town. A toll-gate which then stood in the town had been removed to a place without the town; but subsequently new houses had been built along the road on which the toll-gate was: *Held* that the question whether the gate was within the town or not at any particular time was a question of fact for the determination of the magistrates on a complaint before them for unlawfully demanding a toll; and that the omission to demand a toll for forty years established no right to exemption.—*Deards v. Goldsmith*, 40 L.T. 328.

**Husband and Wife:—**

- (xxviii.) **Ch. Div. F. J.—Chose in Action—Reduction into Possession.**—The receipt by an agent, appointed by husband and wife, of money forming part of an intestate's estate of which the wife is administratrix, is a reduction into possession by the husband of wife's share of the money.—*Dardier v. Chapman*, L.R. 11 Ch. D. 442; 40 L.T. 649.
- (xxix.) **P. D. A. Div.—Divorce—Dismissal of former Petition—Estoppel.**—A petition by a husband for dissolution of marriage on the ground of his wife's adultery was dismissed on his application and on his paying the costs of respondent and co-respondent: *Held* that this did not estop him from relying upon the same acts of adultery in support of a second petition.—*Hall v. Hall*, 40 L.T. 525; 27 W.R. 664.
- (xxx.) **Ch. Div. F. J.—Separate Estate—Judgment against—Costs.**—In an action against a married woman and her husband, judgment was given charging property vested in her or in any other person in trust for her with the payment of the debt and costs, and directing inquiries as to her separate estate: and on inquiry it appeared that she was entitled for her separate use to an annuity vested in a trustee: *Held*, that the debt with interest at 4 per cent. and costs when taxed, must be declared a charge on the annuity without prejudice to the claims of the trustee, and that plaintiff must pay the husband's costs and add them to his debt.—*Collett v. Dickinson*, 40 L.T. 394.
- (xxxi.) **Ch. Div. M. R.—Separation Deed—Custody of Children—Breach of Covenant.**—In an action by a husband to enforce the covenants in a deed of separation which provided that the wife should have the custody of a daughter, the wife alleged that plaintiff had broken the covenants in the deed, and she asked for judicial separation: *Held*, that the deed was a bar to the wife's claim for judicial separation, that the agreement by the wife to live separately from her husband might be enforced by the husband, and that the circumstance of an order having been made by the Court, on the application of the daughter by plaintiff as next friend, giving the custody of the daughter to the plaintiff did not constitute a breach of the covenant in the deed. Injunction granted restraining the wife from taking proceedings to compel the husband to cohabit with her.—*Besant v. Wood*, 40 L.T. 445.
- (xxxii.) **C. A.—Separation Deed—Custody of Children—36 & 37 Vict., c. 12, s. 2.**—By a deed of separation between a husband and wife it was agreed that wife should have the custody of an infant daughter. A petition was presented by the husband on his own behalf and as best friend of the infant, for an order that the infant might be given up to his custody on the grounds that the wife held and propogated atheistic opinions and had published a book of an immoral character: *Held*, that the infant must be given up to the father.—*Re Besant*, 48 L.J. Ch. 497; 40 L.T. 469; 27 W.R. 741.
- (xxxiii.) **C. A.—Wife's Equity to Settlement—Life Interest.**—Decision of V.C.M. (see *Husband and Wife* vii., p. 15) affirmed.—*Taunton v. Morris*, 48 L.J. Ch. 408; 27 W.R. 718.



- (xxxiv.) **Ch. Div. V. C. H.**—*Wife's Equity to Settlement—Pending Administration.*—In an administration action, on petition by a married woman absolutely entitled to a share in the residue : after decree and before further consideration the Court made an order enforcing the wife's equity to a settlement, though her share had not then been ascertained.—*Robinson v. Robinson*, 48 L.J. Ch. 507; 27 W.R. 781.

#### Isle of Man, Law of:—

- (i.) **P. C.**—*Rights of Crown.*—The crown is not entititled to the clay and sand in the customary estates of inheritance in the Isle of Man.—*Attorney-General v. Mylchreest*, L.R. 4 App. 294.

#### Justice of Peace:—

- (i.) **Q. B. Div.**—*Disqualifying Interest—Prosecution for Nuisance*—38 & 39 Vict., c. 55, s. 258.—A town council being the urban sanitary authority, instituted a prosecution before Justices for a nuisance. Two of the Justices who convicted were town councillors and had voted at the meeting when the prosecution was resolved on : *Held* that the Justices were interested parties and that the conviction was bad.—*Regina v. Milledge*, L.R. 4 Q.B.D. 332; 27 W.R. 659.

#### Landlord and Tenant:—

- (xxii.) **Ch. Div. V. C. H.**—*Agreement for Lease—Statute of Frauds.*—A letter containing an offer of a lease not signed in writing by the sender, but written on paper with his name and address printed at the top of the sheet so as to show that the sender recognises it as his own name, is a sufficient contract within the Statute of Frauds to charge the sender.—*Torret v. Cripps*, 27 W.R. 706.
- (xxiii.) **C. A.**—*Agreement for Lease—Uncertain Term—Specific Performance.*—*Held*, varying the decision of V. C. B. (see *Landlord and Tenant* x, p. 55), that plaintiff was entitled only to a lease for the residue of the term less one day if he should so long live.—*Kusel v. Watson*, L.R. 11 Ch.D. 129; 49 L.J. Ch. 413; 27 W.R. 714.
- (xxiv.) **C. P. Div.**—*Distress—Conversion—Rescue—Auctioneer.*—Plaintiff sent his bailiff with a written authority to distrain for money due to him by a tenant, which he was entitled to distrain for. The bailiff showed this authority to defendant, an auctioneer, who was on the premises, and made an inventory and valuation. The tenant and defendant then proceeded to sell the goods on the premises in disregard of the distress : *Held* that plaintiff could maintain an action for rescue against defendant.—*Iredale v. Kendall*, 40 L.T. 362.
- (xxv.) **C. P. Div.**—*Lease of Sporting Rights—Covenant to keep down Rabbits.*—Plaintiff granted a lease of sporting rights to defendant which contained a covenant that the latter should, during the term, keep down the rabbits on the estate, so that no appreciable damage should be done to the crops : at that time, and at date of action, R. was tenant of the estate : plaintiff was not under any liability to compensate R. for damage to crops from rabbits. In an action by plaintiff for breach of the covenant : *Held* that he could only recover nominal damages.—*West v. Houghton*, 40 L.T. 364; 27 W.R. 678.

#### Lands Clauses Act:—

- (vi.) **Ch. Div. V. C. H.**—*Married Women's Separate Estate—Election—Payment Out to Husband.*—Purchase-moneys of real estate, to which a married woman was absolutely entitled, having been paid into Court under sec. 69, of the Lands Clauses Act, 1845, on petition by her and her husband for payment out to the latter, and on her separate examination, an order was made for payment out to the husband.—*Re Robins's Estate*, 27 W.R. 705.

- (vii.) **Ch. Div. F. J.**—*Re-investment—Erection of Buildings.*—Part of a fund in Court, the proceeds of sale of glebe lands taken by a railway company, was ordered to be paid to the rector towards recouping past outlay in the erection of buildings on the glebe, on evidence that they formed a permanent and valuable improvement.—*Ex parte Rector of Holywell-cum-Needlingworth*, 27 W.R. 707.
- (viii.) **Ch. Div. F. J.**—*Superfluous Lands—Land over Tunnel.*—A railway company cannot grant building rights over, or sell as superfluous land, the surface over a tunnel, unless their Act contains special provisions in that behalf.—*Re Metropolitan District Rail. Co. and Cosh*, 40 L.T. 482.

**Lunacy:—**

- (v.) **Ch. Div. F. J.**—*Lunatic Defendant—Service of Writ.*—In an action for specific performance, when one of the parties had become a lunatic, so found by inquisition, but no committee had been appointed, the Court directed service of the writ upon the keeper of the asylum at which the lunatic was, or upon the person with whom she was residing.—*Than v. Smith*, 27 W.R. 617.
- (vi.) **C. A.**—*Principal and Agent—Lunacy of Principal.*—Where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy with a person without knowledge of the lunacy.—*Drew v. Nunn*, 40 L.T. 671.

**Market:—**

- (iii.) **Ch. Div. M. R.**—*Rival Market—Sales by Auction.*—An auctioneer advertised sales by auction every Monday near a place where there was a market every Thursday: *Held* that he was setting up a rival market, and injunction granted to restrain him from selling.—*Elwes v. Payne*, 27 W.R. 704.

**Master and Servant:—**

- (v.) **C. P. Div.**—*Injury to Servant—Carrier—Tort.*—Plaintiff's servant took a ticket and travelled by the L. Railway, all the employes and rolling-stock of which were supplied by the G. E. Railway Company, and was injured in consequence of an accident, caused by the negligence of the G. E. Company's signalman: *Held* that an action would lie by plaintiff for loss of services.—*Berringer v. G. E. Rail. Co.*, L.R. 4 C.P.D. 163; 48 L.J. C.P. 400; 27 W.R. 681.

**Metropolitan Management:—**

- (v.) **Q. B. Div.**—*District Rate—18 & 19 Vict., c. 120, ss. 158, 159.*—*Held* that a precept to overseers, under ss. 158, 159, of Metropolitan Management Act, 1855, for the levy of a rate, which required the rate to be levied, as regards certain classes of lands, in the proportion of one-fourth part only of the net annual value of such lands, was good, although the classes of lands mentioned did not lie together, but were scattered through the parish.—*London & Brighton Rail. Co. v. Guardians of Lewisham*, L.R. 4 Q.B.D. 389; 48 L.J. M.C. 116; 40 L.T. 716; 27 W.R. 783.
- (vi.) **Ex. Div.**—*Metropolitan Asylum District—Small Pox Hospital—Nuisance—30 & 31 Vict., c. 6.*—The owners of land adjoining the Hampstead Small Pox Hospital brought an action against the managers of the Metropolitan Asylum District for damages for injuries sustained in consequence of the erection of the hospital, and the jury found that the hospital was a nuisance, occasioning damage to plaintiffs, and that, assuming the defendants were legally entitled to erect and carry on the hospital, they had not done so with proper care and skill: *Held* that

plaintiffs were entitled to a verdict with costs, and an injunction to restrain the carrying on of the hospital so as to be a nuisance.—*Hill v. Managers of Metropolitan Asylum District*, 40 L.T. 491.

- (vii.) **Q. B. Div.**—*Obligation to Remove Dust—Contract for Sale of Dust*—18 & 19 Vict., c. 120, s. 125.—The obligation imposed by s. 125 of the Metropolitan Management Act, 1855, on a vestry to remove dirt, ashes, &c., from houses in the parish extends only to dirt, ashes, and things *ejusdem generis*, and therefore a contract for sale by the vestry of the dust and refuse collected by them does not include broken glass, metal, &c., which may happen to be thrown into the dustbins emptied by the vestry.—*Collins v. Paddington Vestry*, 48 L.J. Q.B. 345; 27 W.R. 504.
- (viii.) **Ch. Div. F. J.**—*Party Wall*—18 & 19 Vict., c. 122, s. 3.—A wall having a shed on one side and water-closets on the other: *Held* to be a party wall within the Metropolitan Building Acts, so far as the water-closets and shed were co-extensive.—*Knight v. Pursell*, L.R. 11 Ch. D. 412; 48 L.J. Ch. 395; 40 L.T. 391.
- (ix.) **Q. B. Div.**—*Valuation of Property—Supplemental List*—32 & 33 Vict., c. 67.—Where, under sec. 43 of 32 & 33 Vict., c. 67, the mains and pipes of a waterworks company have been inserted in the quinquennial valuation list, a supplemental valuation list may be made under secs. 46 & 47 during the five years so as to include an increase in value of the same mains by reason of their connection with new houses.—*Regina v. New River Co.*, L.R. 4 Q.B.D. 309; 43 L.J. M.C. 123; 40 L.T. 322; 27 W.R. 785.
- (x.) **Ex. Div.**—*Vestryman—Churchwarden—Bankruptcy*—18 & 19 Vict., c. 120, ss. 2, 54.—A churchwarden who is, under sec. 2 of the Metropolitan Management Act, 1855, *ex officio* a member of a vestry, ceases to be so on bankruptcy, and is liable to a penalty if he continue to act as such member.—*Leftly v. Monnington*, 27 W.R. 787.

#### Mines:—

- (viii.) **C. P. Div.**—*Agent—Certified Manager—Conviction*—35 & 36 Vict., c. 76, s. 51.—The conviction and fine of a certified manager of a mine for a breach of the regulation in sec. 51, sub-sec. 1 of Mines Regulation Act, 1872, does not prevent the agent of the mine from being also convicted in respect of the same breach.—*Wynne v. Forester*, 40 L.T. 524.

#### Mortgage:—

- (xxii.) **Ch. Div. V. C. B.**—*Annuity—Policy of Insurance—Redemption*.—P., in consideration of £600, granted to N. an annuity for 99 years if P.'s wife should so long live, and P.'s wife, by the same deed, granted the rents and profits of property, to which she was entitled for her separate use, to N. during her life on trust to pay thereout the annuity and such premiums of insurance as therein mentioned, and subject thereto to account for the residue to the wife. The amount of the annuity was made up of the interest due on the £600 and the premiums payable for an insurance for £600 on P.'s wife, effected by N. P.'s wife having died: *Held* that N. was entitled to retain the whole of the policy monies, which, by reason of bonuses, amounted to more than £600.—*Preston v. Neele*, 40 L.T. 303; 27 W.R. 642.
- (xxiii.) **Ch. Div. M. R.**—*Equitable Mortgage—Sale or Foreclosure*—15 & 16 Vict., c. 86, s. 48.—An equitable mortgagee, by deposit of deeds accompanied by an agreement to execute a legal mortgage, is entitled to either sale or foreclosure.—*York Union Banking Co. v. Artley*, L.R. 11 Ch. D. 205; 27 W.R. 704.
- (xxiv.) **C. A.**—*Foreclosure—Bankruptcy—Redemption*.—An order having been made by the Court of Bankruptcy foreclosing the trustee of a bankrupt

in respect of mortgage property: *Held*, that the trustee was entitled to six months to redeem, though he had admitted that he had no assets of the bankrupt, and that as the mortgagee had not applied to the registrar for a sale, an order for sale could not be made on appeal.—*Ex parte Fletcher, Re Hart*, L.R. 10 Ch. D. 610; 27 W.R. 622.

- (xxv.) Ch. Div. M. R.—*Foreclosure—Sale*—15 & 16 Vict., c. 86, s. 55.—The 55th sec. of the Chancery Procedure Act, 1852, does not authorise the Court in an ordinary foreclosure action to direct a sale on an interlocutory application.—*London and County Banking Co. v. Dover*, L.R. 11 Ch. D. 204; 48 L.J. Ch. 336; 27 W.R. 749.
- (xxvi.) C. A.—*Priority—Voluntary Deed—Consolidation*—27 Eliz., c. 4.—Decision of F. J. (see *Mortgage* ix., p. 21) affirmed on first point, but *held*, that plaintiffs were entitled to consolidate.—*Cracknall v. Janson*, L.R. 11 Ch. D. 1; 40 L.T. 640.
- (xxvii.) Ch. Div. V. C. H.—*Redemption—Lost Deed—Indemnity—Interest*.—Notice to redeem a mortgage having been given, a title deed was missing, and mortgagor brought an action for redemption and indemnity: *Held* that the action was justifiable, though an offer of indemnity had been made; and it appearing that the lost deed was in the hands of a third party to whom defendant's former solicitor had fraudulently pledged it, leave was given to plaintiff to take proceedings to recover it: *Held* also that interest on the mortgage debt ceased to run on the day fixed for redemption by the notice.—*James v. Rumsey*, L.R. 11 Ch. D. 398; 48 L.J. Ch. 345; 27 W.R. 617.
- (xxviii.) C. A.—*Trust for Sale—Express Trust of Surplus—Statute of Limitations*.—Decision of V.C.M. (see *Mortgage* xxi., p. 88) reversed.—*Johnson v. Mounsey*, L.R. 11 Ch. D. 284; 27 W.R. 537.
- (xxix.) Ch. Div. F. J.—*Trust for Sale—Express Trust of Surplus—Statute of Limitations*.—When twenty years have elapsed from entry by a mortgagee without any subsequent acknowledgment, mortgagor's right of redemption becomes extinct, and if the mortgage deed contains a power of sale with a trust of surplus proceeds for mortgagor, and the power has not been exercised within the twenty years from entry, the trust of the surplus proceeds becomes extinct.—*Chapman v. Corpe*, 27 W.R. 781.

#### Municipal Law:—

- (vii.) Q. B. Div.—*Reformatory School—Cost of Clothing*—29 & 30 Vict., c. 117, s. 23; 40 & 41 Vict., c. 21, s. 4.—The cost of clothing requisite for the admission of a youthful offender to a reformatory school under sec. 23 of Reformatory School Act, 1866, is included in the expenses provided for by sec. 4 of Prison Act, 1877.—*Prison Commissioners v. Liverpool Corporation*, L.R. 4 Q.B.D. 329; 48 L.J. Q.B. 436; 40 L.T. 680; 27 W.R. 799.

#### New South Wales, Law of:—

- (ii.) P. C.—*Liability of Municipality for Non-repair of Drains*.—*Held* that a municipality was liable for damages in respect of a nuisance in a highway, caused by the non-repair of a drain under their control.—*Borough of Bathurst v. Macpherson*, L.R. 4 App. 256.

#### Partition:—

- (iii.) C. A.—*Sale*—31 & 32 Vict., c. 40, ss. 3, 5.—*Held* reversing the decision of V.C.M. (see *Partition* i., p. 22), that a sale ought to be directed with liberty to all parties, other than those having the conduct of the sale, to bid.—*Gilbert v. Smith*, L.R. 11 Ch. D. 78; 48 L.J. Ch. 352; 40 L.T. 635; 27 W.R. 719.

- (iv.) **Ch. Div. V. C. B.**—*Sale—Discretion of Court*—31 & 32 Vict., c. 40, s. 4.—Under sec. 4 of the Partition Act, 1868, though persons interested to the extent of a moiety request a sale, the Court has a discretion to grant or refuse the request.—*Saaton v. Bartley*, 27 W.R. 615.
- (v.) **Ch. Div. V. C. H.**—*Sale—Leave to Bid*.—The Court will not, on an order for sale by auction in a partition action under the Acts of 1868 and 1876, give leave to bid at the auction to the party having the conduct of the sale.—*Verrall v. Cathcart*, 27 W.R. 645.
- (vi.) **Ch. Div. M. R.**—*Sale—Share of Married Woman—Election*.—Where real estate is sold in a partition action, the share of the purchase-money belonging to a married woman may be paid out to her husband, she electing on her separate examination to have it treated as personalty.—*Standerling v. Hall*, 48 L.J. Ch. 382; 27 W.R. 749.

#### Partnership:—

- (xiv.) **C. P. Div.**—*Bill Drawn by One Partner—Liability*.—Where a partnership is carried on in the name of an individual member of it, any note or other obligation signed by such member in his own name, is *prima facie* presumed to be his note, and not that of the partnership.—*Yorkshire Banking Co. v. Beatson*, 48 L.J. C.P. 428; 40 L.T. 654.

#### Pier:—

- (i.) **Ex. Div.**—*Toll—Exhibition of on Notice-board*.—Where a Pier Act requires the exhibition on a board of the duties for the time being, authorized to be taken as thereinbefore mentioned, and gives a schedule of maximum tolls, but allows of their being reduced and raised again by resolution of proprietors, the board must exhibit the tolls as fixed at the time in question.—*Greyson v. Potter*, L.R. 4 Ex. D. 142; 48 L.J. M.C. 86.

#### Poor Law:—

- (v.) **Q. B. Div.**—*Rating Appeal—Valuation List—Notice of Objection*—27 & 28 Vict., c. 39, s. 1.—An appellant who has given notice of objection to the valuation list and failed to obtain relief before a poor rate is made in conformity with the list, is not bound to give a fresh notice of objection after the rate is made in order to entitle him to appeal.—*Regina v. Wiltshire Justices*, L.R. 4 Q.B.D. 326; 40 L.T. 681.
- (vi.) **Q. B. Div.**—*Settlement*—39 & 40 Vict., c. 61, s. 35.—Held that a pauper born in 1840, who had never acquired a settlement in her own right, acquired her father's settlement, which was a birth settlement which could be ascertained without inquiring into his derivative settlement.—*Hereford Union v. Warwick Union*, 48 L.J. M.C. 111; 40 L.T. 588; 27 W.R. 506.
- (vii.) **Q. B. Div.**—*Settlement—Child under Seven*—39 & 40 Vict., c. 61, s. 34.—The pauper was an illegitimate child born in the parish of R. When the child was a fortnight old it was placed by its mother in the care of people who lived with it for six years in the parish of S.: Held that there was sufficient ground for finding that the pauper was settled at S.—*Regina v. Leeds Union*, L.R. 4 Q.B.D. 323; 40 L.T. 521; 27 W.R. 708.

#### Power of Appointment:—

- (iv.) **Ch. Div. V. C. H.**—*Exclusive Power—Condition of Forfeiture—Remoteness*.—The donee of an exclusive power of appointment by will among her children, appointed the property among the children in certain shares, with a proviso that if during her lifetime or after her death any of them should marry a person not belonging to the Jewish religion, or should forsake the Jewish religion, then such child should

forfeit all share in the trust premises, and the forfeited share should go over to the other children then living: *Held* that the forfeiture clause was valid so far as it was expressed to take effect in the lifetime of the appointor, but void for remoteness so far as it purported to affect after the appointor's death the share of a child born after the death of the donor of the power.—*Hodgson v. Halford*, 27 W.R. 545.

**Practice :—**

- (cxci.) **C. A.**—*Appeal—Costs*.—When on an appeal respondents have given notice that they intend to apply to have the judgment below varied, and the appeal is dismissed, appellants will be ordered to pay the costs of the appeal, except such as were occasioned by the notice.—*The Lauretta*, L.R. 4 P.D. 25; 40 L.T. 444.
- (cxcii.) **C. A.**—*Appeal—Second Notice*.—Defendants having given notice of appeal from a decree for a particular day, omitted to set it down till that day, and, on finding out their mistake, gave a second notice, which was duly set down: *Held* that they were entitled to proceed on the second notice.—*Norton v. L. & N. W. Rail. Co.*, L.R. 11 Ch. D. 118; 40 L.T. 597; 27 W.R. 773.
- (cxci.) **C. A.**—*Appeal—Security for Costs—Insolvency—Ord. 58, r. 15*.—When an appellant is insolvent, a moderate sum should, if asked for, be offered, and, if offered, accepted as security for costs of appeal.—*The Constantini*, 27 W.R. 747.
- (cxci.) **C. A.**—*Appeal—Setting down—Ord. 58, r. 8*.—Notice of appeal from an interlocutory order was given by defendants within twenty-one days from the day on which the order was made. The order was not drawn up till more than a month afterwards, and as soon as it was drawn up, defendants set down the appeal: *Held* that as it was plaintiff's duty to draw up the order, he could not object to the appeal not being in time.—*Goodbarne v. Fothergill*, L.R. 10 Ch. Div. 613; 40 L.T. 408; 27 W.R. 587.
- (cxci.) **C. A.**—*Appeal—Stay of Proceedings—Patent Action*.—In an action to restrain infringement of letters patent, an injunction was granted against defendant, and an account directed of profits made by him in the sale of goods infringing the patent. Defendant having given notice of appeal, the appeal was ordered to be advanced, and proceedings stayed till the hearing.—*Adair v. Young*, L.R. 11 Ch. D. 136; 40 L.T. 598.
- (cxci.) **C. A.**—*Appeal from Chamber—Time—Long Vacation—Ord. 54, r. 6*.—An appeal from an order of a judge in chambers after the expiration of eight days is too late, although such order was made in the long vacation, and no Divisional Court sat during the eight days succeeding the date of the order.—*Runtz v. Sheffield*, L.R. 4 Ex. D. 150; 48 L.J. Ex. 885; 40 L.T. 539.
- (cxci.) **C. P. Div.**—*Appeal from Master—Time—Ord. 54, r. 4—Ord. 57, r. 6*.—Where a summons on appeal to a Judge at Chambers from the master is not made returnable within the four days allowed by Ord. 54, r. 4, the Court or a judge has a discretionary power to enlarge the time.—*Gibbons v. London Financial Association*, 27 W.R. 619.
- (cxci.) **Q. B. Div.**—*Appeal from County Court—Garnishee Order—30 & 31 Vict., c. 142, s. 13; 38 & 39 Vict., c. 50, s. 6*.—There is no right of appeal from the decision of a County Court Judge in the matter of a garnishee order.—*Mason v. Wirral*, 27 W.R. 676.
- (cxci.) **Ex. Div.**—*Appeal from Inferior Court—Time—Ord. 58, r. 19*.—Appeals from inferior Courts must be entered within the time given on the notice of appeal for the hearing.—*Donovan v. Brown*, L.R. 4 Ex. D. 148; 48 L.J. Ex. 456; 27 W.R. 648.



- (cc.) **C. A.—Charging Order—Unascertained Amount.**—By a decree plaintiffs were declared entitled to one-fifth share of the proceeds of a sale, and an account and payment to them of what should be found due with their costs was ordered: *Held* that they were not entitled to a charging order or stop order on a fund in Court in another action belonging to the same defendants.—*Widgery v. Tepper*, 48 L.J. Ch. 867.
- (ccii.) **C. A.—Costs—Admiralty Appeal.**—*Semble* in future the appellant in successful admiralty appeals will have the costs of the appeal.—*The Swansea v. The Condor*, L.R. 4 P.D. 115; 40 L.T. 442; 27 W.R. 748.
- (cciii.) **P. D. A. Div.—Costs—Collision.**—Cargo owners, whose cargo had been lost through a collision, brought an action against the vessel which had come into collision with the vessel carrying their cargo, and both vessels were found to blame: *Held* that the defendants must pay the costs of the action.—*The City of Manchester*, 40 L.T. 591; 27 W.R. 697.
- (cciv.) **Q. B. Div.—Costs—Inferior Court—Judicature Act, 1873, s. 91, Ord. 55.**—Under sec. 91 of Judicature Act, 1873, Ord. 55 is applied to proceedings in the Liverpool Court of Passage.—*King v. Hawksworth*, L.R. 4 Q.B.D. 371; 27 W.R. 660.
- (ccv.) **C. A.—Costs—Divisional Court—39 & 40 Vict., c. 59, s. 17—Ord. 55.**—When an action or issue has been tried by a jury, the Divisional Courts have a separate power, co-ordinate with that of the judge at the trial, to make an order to deprive the successful party of his costs, and no appeal lies from such order: sec. 17 of the Appellate Jurisdiction Act, 1876, is directory only so far as relates to the transaction of business before a single judge.—*Myers v. Defries*; *Siddons v. Lawrence*, 48 L.J. Ex. 446; 27 W.R. 791.
- (ccvi.) **Ch. Div. F. J.—Costs—Partition.**—In a partition action where plaintiffs and defendants were absolutely entitled to the whole of an estate which was partitioned: *Held* that the costs of the action should be borne by the parties rateably in proportion to the value of their shares.—*Bowes v. Marquis of Bute*, 27 W.R. 750.
- (ccvii.) **Ch. Div. M. R.—Costs—Partnership Action—Misconduct of Partner.**—Though the costs of a partnership action, occasioned by no fault on either side, will be ordered to be paid out of the partnership assets, yet, where the action has been rendered necessary by the misconduct of either party, the Court will order that party to pay the costs.—*Hamer v. Giles*, 48 L.J. Ch. 508.
- (ccviii.) **Ch. Div. V. C. H.—Costs—Sheriff—Failure to make Return.**—An under-sheriff having failed to make a return to writ of *fi. fa.* after repeated applications, the sheriff was ordered to pay the costs of the order *nisi* made on *ex parte* motion and of the order made on motion of course.—*Hall v. Ley*, 27 W.R. 750.
- (ccix.) **Ch. Div. M. R.—Costs—Set-off—Award—Solicitor's Lien.**—By an arbitrator's award in an action, plaintiff was ordered to pay a sum of money to defendant, and defendant was ordered to pay plaintiff part of his costs when taxed: *Held* that defendant was entitled to have the debt set off against the taxed costs, and that this right was not affected by the solicitor's lien for costs.—*Pringle v. Gloag*, L.R. 10 Ch. D. 676; 48 L.J. Ch. 380; 40 L.T. 512; 27 W.R. 574.
- (ccx.) **Ch. Div. M. R.—Costs—Taxation—Counsel's Fees.**—In taxing costs of an action in the Chancery Div. refreshers to counsel should be allowed for every day, after the first day, occupied by the trial when the evidence is taken orally, but not when it is taken by affidavit.—*Harrison v. Wearing*, L.R. 11 Ch. D. 206; 48 L.J. Ch. 365; 27 W.R. 526.
- (ccxi.) **C. A.—Counter-Claim—Third Party—Ord. 22, r. 5; 16, r. 17.**—In answer to a claim by a company for money lent, defendant set up a

- counter-claim against the company and T., stating that T. had purchased a business from him on certain terms which T. had failed to perform, that T. formed the plaintiff company to which he transferred the business, that the company adopted the agreement but failed to perform it, and defendant claimed damages against the company and performance of the agreement, and in the alternative, damages against T.: *Held* that T. could not be joined as defendant under sec. 24, sub-sec. 3 of the Judicature Act, 1873, and Ord. 22, r. 5, but could only be brought in under Ord. 16, r. 17.—*Central African Trading Co. v. Grove*, 40 L.T. 540.
- (ccxi.) **Ch. Div. F. J.**—*Death of Plaintiff—Motion to Dismiss*.—A sole plaintiff having died insolvent and intestate, on defendant's application the Court appointed a person to represent the deceased's estate, in order that defendant might move for dismissal for want of prosecution.—*Wingrove v. Thompson*, L.R. 11 Ch. D. 419.
- (ccxii.) **Ch. Div. F. J.**—*Default of Appearance—Foreclosure*.—In a foreclosure action where defendant had not appeared, after statement of claim filed on motion for judgment in default of appearance, the plaintiff is only entitled to an ordinary judgment *nisi* for foreclosure.—*Patey v. Flint*, 40 L.T. 651; 27 W.R. 529, 595.
- (ccxiii.) **P. D. A. Div.**—*Discovery—Inspection of Documents—Salvage Action*.—In a salvage action in which defendant admits his liability and makes a tender, plaintiff is entitled to discovery and inspection of documents, but at his own risk and cost if such discovery should prove unnecessary.—*The Maria*, 40 L.T. 295.
- (ccxiv.) **Ch. Div. F. J.**—*Discovery—Interrogatories—Further Answer—Ord. 31, r. 10*.—A party applying for further answers to interrogatories, should deliver particulars and objections to the answers alleged to be insufficient.—*Anstey v. North and South Woolwich Subway Co.*, L.R. 11 Ch. D. 439; 40 L.T. 393; 27 W.R. 575.
- (ccxv.) **C. A.**—*Discovery—Petition of Right—23 & 24 Vict., c. 34, s. 7*.—In a petition of right the Crown is entitled to obtain discovery of documents from the suppliant.—*Tomline v. The Queen*, 48 L.J. Ex. 453; 40 L.T. 542; 27 W.R. 651.
- (ccxvi.) **C. A.**—*Discovery—Production of Documents—Ord. 31, rr. 1, 11; 52, r. 6*.—A mandatory order for the delivery up of documents, being the substantial relief claimed in the action, cannot be made on an interlocutory motion. It is not correct to say that under no circumstances will plaintiff be allowed production before delivery of claim.—*Republic of Costa Rica v. Strousberg*, L.R. 11 Ch. D. 323; 40 L.T. 401; 27 W.R. 512.
- (ccxvii.) **Ch. Div. M. R.**—*Dismissal for Want of Prosecution—Enlargement of Time by Consent*.—Where plaintiff has agreed with some defendants to extend the time for delivery of their defence, other defendants who do not know of this, cannot move to have the action dismissed on the ground that plaintiff is out of time in delivering his reply to their defence.—*Ambroise v. Evelyn*, 27 W.R. 639.
- (ccxviii.) **Q. B. Div.**—*Evidence—Foreign Action—19 & 20 Vict., c. 113*.—The person directed to take an examination of a witness in a foreign action under the Foreign Tribunals Evidence Act, 1856, is not necessarily bound by the rules as to admissibility of evidence in this country.—*Desilla v. Fells*, 40 L.T. 423.
- (ccxix.) **C. A.**—*Interpleader—1 & 2 Will. IV., c. 58, s. 1*.—Decision of C. P. Div. (see *Practice* clviii., p. 93) affirmed on the ground that the granting of an interpleader order is purely discretionary.—*Wright v. Freeman*, 40 L.T. 358.
- (ccxx.) **P. D. A. Div.**—*Legitimacy Declaration—Citation to see Proceedings*.—The party it is proposed to cite to see proceedings under s. 7 of the



Legitimacy Declaration Act, 1858, must be directly interested in disputing the facts it is proposed by the petitioner to set up.—*Mansel v. The Attorney-General*, 40 L.T. 367.

- (ccxxi.) **Ch. Div. M. R.**—*Motion on Admissions—Partition—Sale—Ord. 40, r. 11.*—An order for sale may be made in a partition action on a motion upon admissions on the pleadings under Ord. 40, r. 11.—*Burnell v. Burnell*, L.R. 11 Ch.D. 213; 48 L.J. Ch. 412; 27 W.R. 749.
- (ccxxii.) **C. P. Div.**—*New Trial—Entering Judgment—Ord. 40, r. 10—39 & 40 Vict., c. 59.*—A divisional Court, on a motion to set aside a verdict found for the plaintiff, may give judgment for defendant instead of ordering a new trial: Ord. 40, r. 10, not being altered by the Appellate Jurisdiction Act, 1876, or the Rules of December, 1876.—*Daun v. Simmins*, 48 L.J. C.P. 343; 40 L.T. 556.
- (ccxxiii.) **Ch. Div. F. J.**—*Order of House of Lords.*—An application to make an order of the House of Lords an order of the High Court may be made *ex parte*.—*British Dynamite Co. v. Krebs*, L.R. 11 Ch.D. 448; 40 L.T. 514; 27 W.R. 575.
- (ccxxiv.) **Ch. Div. F. J.**—*Payment into Court—Trustee Relief Act—Evidence—Costs.*—When a trustee about to pay money into Court under the Trustee Relief Act becomes aware of the existence of a claim after he has filed his affidavit, he must file a supplemental affidavit stating the claim, or he will be personally liable for costs caused by his neglect to do so.—*Re Allen's Trust*, 40 L.T. 456; 27 W.R. 529.
- (ccxxv.) **C. A.**—*Payment into Court—Trustee Relief Act—Notice.*—Where a person mentioned in the affidavit on payment into Court under the Trustee Relief Act as being interested in the fund, could not be found, the Court declined to give directions as to what would be sufficient notice of the payment in.—*Re Hardley's Trusts*, L.R. 10 Ch.D. 664; 48 L.J. Ch. 335; 40 L.T. 409; 27 W.R. 587.
- (ccxxvi.) **Ch. Div. F. J.**—*Pleading—Leave to Amend—Costs.*—An order had been made giving leave to strike out the name of one of the defendants, and general leave to amend; and the name of another defendant, whose interest in the action had determined, was struck out without providing for his costs: *Held* that it was improper to strike out his name, but that he could not recover the costs of the action from the plaintiff.—*Wymer v. Dodds*, L.R. 11 Ch. D. 436; 40 L.T. 420; 27 W.R. 675.
- (ccxxvii.) **C. A.**—*Pleading—Parties—Foreclosure.*—One of several mortgagees can maintain an action to foreclose, making the other mortgagees co-defendants, if they are unwilling or unable to join as co-plaintiffs.—*Luke v. South Kensington Hotel Co.*, L.R. 11 Ch. D. 121; 48 L.J. Ch. 361; 40 L.T. 638; 27 W.R. 514.
- (ccxxviii.) **C. A.**—*Pleading—Parties—Following Assets—Action against Residuary Legatee.*—Where a residuary estate has been paid over by the executor to the residuary legatee, a creditor of the testator may bring an action against the personal representative of such legatee for payment of his debt without joining the executor as defendant.—*Hunter v. Young*, 27 W.R. 637.
- (ccxxix.) **Ch. Div. F. J.**—*Pleading—Recovery of Land—Defence.*—In an action for the recovery of land, a defendant, who relies upon an equitable title, must set out in his pleadings the facts on which he relies, and state the assurances through which he claims to be entitled.—*Sutcliffe v. James*, 27 W.R. 750.
- (ccxxx.) **Ch. Div. F. J.**—*Pleading—Scandal—Next Friend—Costs.*—In an action by a wife for the rectification of the marriage settlement, an allegation, in the Statement of Claim, that plaintiff had refused to live

with her husband because of his having committed a criminal assault upon a young girl, was ordered to be struck out as scandalous, and the costs of the application to be paid by the wife's next friend.—*Coyle v. Cumming*, 40 L.T. 455; 27 W.R. 529.

(ccxxxi.) **Ch. Div. F. J.**—*Pleading—Striking out.*—In order that the Court may have power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, it is not necessary that any application to that effect should be made by the injured person.—*Cracknall v. Janson*, L.R. 11 Ch. D. 1; 48 L.J. Ch. 168; 39 L.T. 31; 27 W.R. 55.

(ccxxxii.) **C. A.**—*Pleading—Striking Out—Ord. 19, r. 4.*—In an action upon a guarantee, the statement of claim alleged that it was agreed between defendant and W., that in consideration of W. discounting acceptances of D., defendant would guarantee to W. payment of the acceptances: defendant obtained production of the guarantee, which proved to be in favour of D. and not of W.: the Court refused to strike out the statement as to the guarantee.—*Turquand v. Fearon*, 40 L.T. 543.

(ccxxxiii.) **Ch. Div. V. C. H.**—*Pleading—Striking Out—Reply.*—Where a plaintiff in his reply relied on facts set out in his answer to interrogatories, and referred to the answer for such facts, and also set up new claims for damages, the reply was ordered to be struck out as embarrassing.—*Williamson v. L. & N. W. Rail. Co.*, 27 W.R. 724.

(ccxxxiv.) **C. P. Div.**—*Pleading—Statute of Frauds.*—When a defendant relies on the Statute of Frauds as a defence to an action, he must not only state that he relies on it, but the facts which make it applicable must also be pleaded.—*Pullen v. Snellus*, 48 L.J. C.P. 394; 40 L.T. 363; 27 W.R. 534.

(ccxxxv.) **Ex. Div.**—*Prerogative of Crown—Removal of Causes to Exchequer.*—The prerogative of the Crown to bring proceedings affecting Crown property into the Exchequer by information filed by the Attorney-General, and to restrain proceedings pending elsewhere, is not affected by the Judicature Acts.—*Attorney-General v. Constable*, 48 L.J. Ex. 455; 27 W.R. 661.

(ccxxxvi.) **Ch. Div. F. J.**—*Receiver—Recovery of Land.*—An action for the recovery of land was stayed till another action affecting the same property was ready for trial: the defence was that plaintiff was only a sub-mortgagee. It appearing that the property was wasting, and insufficient for the original mortgage on it: *Held* that plaintiff was entitled to have a receiver appointed.—*Real and Personal Advance Co. v. McCarthy*, 27 W.R. 706.

(ccxxxvii.) **Ch. Div. F. J.**—*Recovery of Land—Joinder of Another Cause of Action—Ord. 17, r. 2.*—An application for leave to join another cause of action with an action for the recovery of land should be made *ex parte* before service of writ.—*Pilcher v. Hinds*, 40 L.T. 422; 27 W.R. 619.

(ccxxxviii.) **C. A.**—*Security for Costs—Foreign Plaintiff.*—In order to obtain an order for security for costs on the ground of plaintiff's residence abroad, it is necessary to show that he is actually abroad at the time of the application.—*Redondo v. Chaytor*, 27 W.R. 701.

(ccxxxix.) **C. P. Div.**—*Security for Costs—Foreign Plaintiff—Interpleader.*—An interpleader issue having been directed between the trustee of a liquidating debtor as plaintiff and attaching creditors as defendants, where the trustee resided abroad: *Held*, that he ought not to be ordered to give security for costs.—*Belmonte v. Aynard*, 40 L.T. 627; 27 W.R. 789.

(ccxl.) **C. A.**—*Service of Pleadings—Amended Writ—Ord. 9, r. 13.*—In an action *in rem.* for necessities supplied a writ was served on the ship, but

the owners did not appear. Subsequently the ship was sold and the proceeds brought into Court in another action. Plaintiffs amended their writ by adding a claim as mortgagees: *Held*, that the amended writ must be served on the registrar and indorsed with the date of service.—*The Cassiopeia*, 27 W.R. 703.

- (ccxli.) **C. A.**—*Service out of Jurisdiction*—Ord. 11, rr. 1, 1a.—An action having been brought to carry out the trusts of a Scotch settlement, the property being in Scotland and the trustees resident there, plaintiff being an infant, and his father, who was his next friend, being an Englishman: *Held* that the Court had no authority to order service of the writ out of the jurisdiction, as no breach of the trusts of the settlement had been committed within the jurisdiction.—*Cresswell v. Parker*, 40 L.T. 599.
- (ccxlii.) **Ch. Div. M. R.**—*Service out of Jurisdiction—Parties in Scotland*—Ord. 11, r. 1a.—Leave to serve a writ on defendant, where both parties resided in Scotland, was refused on the ground that plaintiff would have as complete a remedy by application to the Scotch Courts.—*Ex parte M'Phail*, 48 L.J. Ch. 415; 27 W.R. 525.
- (ccxliii.) **C. A.**—*Special Indorsement—Leave to Defend*—Ord. 14, rr. 1, 6.—Where a defendant to a writ specially endorsed shows a good defence on the merits, the Court has no discretion as to giving leave to defend or imposing terms upon him: but when he merely discloses such facts as are deemed sufficient to entitle him to defend, the Court or a judge may give him leave conditionally or unconditionally.—*Ray v. Barker*, 27 W.R. 745.
- (ccxiv.) **Q. B. Div.**—*Special Indorsement—Leave to Defend—Corporation*.—The provisions of Ord. 14, r. 1, apply to cases where defendants are a corporation.—*Muirhead v. Direct United States Cable Co.*, 27 W.R. 708.
- (ccxlv.) **Ch. Div. F. J.**—*Transfer of Action—Administration*—Ord. 51, r. 2a.—A judge of the Ch. Div., in whose Court an administration action is pending, can order the transfer to himself of such actions only as are brought against the executor in other divisions *quâd* executor.—*Chapman v. Mason*, 40 L.T. 678.
- (ccxlv.) **C. A.**—*Transfer of Action—Arbitration*—Ord. 51, r. 2a.—*Held* on appeal from V.C.B. (see *Practice* clxxxiii., p. 96) that the Court could not, on a motion to restrain proceedings in the Q.B. Div. and transfer them, give leave to the Local Board to prove for their claim in the administration and *semble*, that the order transferring the proceedings was wrong.—*West v. Dowman*, 27 W.R. 697.
- (ccxlvii.) **C. A.**—*Transfer of Action—Trespass—Counter-Claim*.—The vendor of land brought an action in the Q. B. Div. against the purchaser for trespass, and defendant claimed specific performance of an alleged agreement to sell another piece of land and grant a right of way: *Held* that there was no ground for transferring the action to the Ch. Div.—*Storey v. Waddle*, L.R. 4 Q.B.D. 289.
- (ccxlviii.) **Ch. Div. F. J.**—*Transfer of Action—Winding-up Company*.—An action was commenced in the Ex. Div. against the liquidator of a company, which was being wound up in the Ch. Div., for damages for injuries caused by the negligence of the company. A motion to transfer the action to the Ch. Div. was refused on plaintiff undertaking to amend his writ by claiming against the liquidator personally.—*Re Thames Steam Ferry Co.*, 40 L.T. 422; 27 W.R. 503.
- (ccxlix.) **Ch. Div. V. C. B.**—*Trial—Jury—Infringement of Trade Mark*.—In an action to restrain infringement of a trade mark: *Held* that as the issues were of a complicated nature involving inferences of law, it was not a fit case to be tried by a jury.—*Singer Manufacturing Co. v. Looy*, 40 L.T. 647.

- (ccl.) **Ch. Div. F. J.**—*Trial—Jury—Notice—Ord. 36, r. 3.*—A defendant gave notice of motion for a direction that certain issues should be tried before a judge and jury: *Held* a sufficient notice of a desire that issues should be tried, and that an order must be made referring it to Chambers to settle issues, and directing those issues to be tried before a judge and jury at particular assizes.—*Powell v. Williams*, 40 L.T. 679; 27 W.R. 796.
- (ccli.) **C. P. Div.**—*Trial—Liability of Surety—Ord. 36, r. 6.*—In an action against a principal and sureties for breach of contract, the sureties claimed to be discharged by reason of an alteration in the terms of the contract: *Held* not to be a case in which an order should be made for the trial of the question of the sureties' liability before the other questions in the action.—*Tasmanian Main Line Rail. Co. v. Clark*, 27 W.R. 677.

**Principal and Agent:—**

- (xii.) **P. C.**—*Bank Manager—Authority to Prosecute.*—The arrest and prosecution of offenders is not within the ordinary scope of a bank manager's authority.—*Bank of New South Wales v. Owston*, L.R. 4 App. 270; 40 L.T. 500.
- (xiii.) **C. A.**—*Sale by Auction—Conversion.*—P. having granted a bill of sale on all his goods to plaintiff which was not registered, subsequently took the goods to defendant and told him to sell them. Defendant, not knowing of the bill of sale, advanced money to P. on the goods and then sold them by auction, and, after deducting commission and expenses, paid over the balance to P.: *Held* that defendant was liable to plaintiff for the value of the goods as his dealing with them amounted to a conversion.—*Cochrane v. Rymill*, 27 W.R. 776.

**Principal and Surety:—**

- (iii.) **Ex. Div.**—*Subsequent Legislation affecting Indemnity—30 & 31 Vict., c. 127.*—Plaintiff gave a bond to the Crown for the completion of a railway, and defendant agreed to indemnify him against any liability thereunder. The railway was not completed, and plaintiff applied to the Board of Trade under the Railway Companies Act, 1867 (which was passed subsequently to the agreement) to authorize the abandonment of the railway and cancellation of the bond, which was ordered, on condition that the moneys secured by it should be applied as assets of the company. The plaintiff paid under this order a part of the money secured, and the bond was cancelled: *Held* that defendant was liable to indemnify plaintiff in respect of the money so paid.—*Webster v. Petre*, L.R. 4 Ex. D. 127; 27 W.R. 662.

**Probate:—**

- (xi.) **P. D. A. Div.**—*Executor according to the Tenor.*—Testator gave to B. and W. all his real and personal estate, to apply the same, after payment of all debts, to the payment of legacies. Probate was granted to B. and W. as executors according to the tenor.—*In the goods of Bell*, L.R. 4 P.D. 85; 40 L.T. 659.

**Public Health:—**

- (x.) **Ex. Div.**—*Paving Rate—Apportionment—38 & 39 Vict., c. 55, ss. 150, 180, 257.*—Where a rate is made under sec. 150 of the Public Health Act, 1875, the apportionment of the surveyor on an owner who accepts and pays his share is not binding on the urban authority if objected to by other owners, and if so objected to and referred to arbitration, the owner is liable for the sum apportioned on him by the arbitrator, though he had no notice of the arbitration.—*Tunbridge Wells Local Board v. Ackroyd*, 27 W.R. 733.

- (xi.) **Q. B. Div.**—*Paving Street—Owner in Default*—38 & 39 Vict., c. 55, s. 150.—Where an urban authority, upon default by the owner of premises, paves and sewers a street under the powers given by sec. 150 of the Public Health Act, 1875, the expenses incurred cannot be recovered from anyone who, though the owner of premises when notice under the section was first given, had ceased to be owner before the completion of the works.—*Regina v. Swindon Local Board*, L.R. 4 Q.B.D. 305; 48 L.J. M.C. 119; 40 L.T. 424; 27 W.R. 732.
- (xii.) **Q. B. Div.**—*Water-Closet*—38 & 39 Vict., c. 55, s. 35.—Respondent built two cottages, with one privy sufficient for the use of both cottages: *Held* that he had complied with the requirements of the 35th section of the Public Health Act, 1875.—*Clutton Union v. Pointing*, L.R. 4 Q.B.D. 340; 27 W.R. 658.

#### Railway:—

- (xvi.) **Ch. Div. M. R.**—*Agreement to Work and Maintain—Right to Exclusive Possession*.—An agreement between two railway companies, confirmed by Act of Parliament, provided that the one company should forthwith complete their line, which, when completed, was to be worked and maintained by the other company in perpetuity: *Held* that, after completion, the latter company were entitled to exclusive possession of the line, and that the former company had no right to enter on the property to make improvements.—*Sevenoaks & Maidstone Rail. Co. v. L. C. & D. Rail. Co.*, 40 L.T. 545; 27 W.R. 672.
- (xvii.) **C. A.**—*Bailee—Wrongful Conversion—Trove*r.—Plaintiff, a merchant at H., sent goods to defendants' station at B., to be held by them as warehousemen, to plaintiff's order: A., an agent of plaintiff, obtained the goods from defendants on orders not signed by plaintiff; subsequently plaintiff sold the goods to other persons, and gave them delivery orders, some of whom had paid, and as to those that had not paid, A. had obtained the delivery orders from them, and given them to defendants: *Held*, on an action for damages for pre-delivery, and for the value of the goods not paid for, that plaintiff was only entitled to nominal damages.—*Hiort v. L. & N. W. Rail. Co.*, 40 L.T. 674; 27 W.R. 778.
- (xviii.) **Q. B. Div.**—*Passenger—Intent to Avoid Payment of Fare—Return Ticket*—8 Vict., c. 20, s. 103.—Respondent travelled with half of a tourist return ticket over the latter part of the route covered by it. The ticket had been taken by another person, who had used it over the first part of the route and sold it to respondent. The words "not transferable" were printed on the ticket: *Held* that respondent was liable to be convicted of travelling without having previously paid his fare, and with intent to avoid payment thereof.—*Langdon v. Howell*, L.R. 4 Q.B.D. 337; 27 W.R. 657.
- (xix.) **C. A.**—*Statutory Powers—Letting of Railway Stock—Ultra Vires*.—The E. Railway Co. were empowered by Act of Parliament to take a lease of the line of the T. Railway Co., and to enter into agreements with respect to the working of the line, apportionment of tolls, &c. The E. Co. did not take a lease, but subsequently entered into an agreement with the T. Co. to supply locomotives and rolling stock for working the line: *Held* that such agreement was not *ultra vires*.—*Attorney-General v. Great Eastern Rail. Co.*, 48 L.J. Ch. 428; 40 L.T. 265; 27 W.R. 769.
- (xx.) **H. L.**—*Tolls—Private Act—Construction*.—A company's private Act provided that they might charge tolls for the conveyance of goods not exceeding a certain rate per ton per mile, that for the conveyance of goods for a less distance than four miles, they might make an additional charge for the expense of stopping, &c., and that they might

charge tolls for a fraction of a mile beyond four miles: *Held* that the charge for stopping was not a toll so as to require publication under secs. 93, 95 of the Railways Clauses Act, 1845, and the Court was equally divided as to whether or not the company could charge for the fraction of a mile where the whole distance traversed did not exceed four miles. —*Pryce v. Monmouthshire Canal & Rail. Co.*, L.R. 4 App. 197; 40 L.T. 630; 27 W.R. 666.

**Scotland, Law of:—**

- (viii.) **H. L.**—*Agreement to Disentail—Power of Revocation.*—The minute of agreement between a father and son for the disentailing an estate provided that the father should pay £3,000 to trustees for the benefit of his son, it being open to the father to limit the control over it in such manner as he should think proper, and in particular to direct the trustees to hold for the son's behoof in life-rent only, and for the issue of his body in fee, whom failing, to his nearest heirs and assignees. Subsequently the father executed a bond, in which the son declared his acquiescence, whereby the son's interest was restricted to a life-rent, and, failing issue, the fee was given to his aunt and her children. The son married and died, leaving a widow and no children and having executed a deed revoking the gift to his aunt and giving the fund to his widow: *Held* that the deed was effectual.—*Wightman v. Costine*, L.R. 4 App. 228.
- (ix.) **H. L.**—*Unlimited Company—Winding-up—Trustee Shareholders.*—Shares in an unlimited company, registered under sec. 180 of the Companies Act, 1862, were transferred to the appellants upon certain trusts, and they were described in the deed of transfer and the stock ledger as trust despones: *Held*, on the winding-up of the company, that they were personally liable, and that their liability was not limited to the amount of the trust estate.—*Muir v. City of Glasgow Bank*, 40 L.T. 339; 27 W.R. 603.

**Settlement:—**

- (xi.) **Ch. Div. M. R.**—*Trust for Re-Investment—Conversion.*—A settlement of lands contained a power of sale and a trust for re-investment. All the trusts were exhausted except a legal jointure: and some of the lands had been sold and the proceeds were in Court: *Held* that the fund must be treated as real estate as between the real and personal representatives of the person entitled subject to the jointure.—*Walrond v. Rosslyn*, 27 W.R. 728.

**Ship:—**

- (xli.) **C. A.**—*Bill of Lading—Excepted Perils—Negligent Stowage.*—Decision of C.P. Div. (see *Ship* xviii., p. 68) affirmed.—*Hayn v. Culliford*, L.R. 4 C.P.D. 182; 48 L.J. C.P. 372; 40 L.T. 536; 27 W.R. 541.
- (xlii.) **P. D. A. Div.**—*Bottomry—Interest.*—The ordinary rate of interest payable on a bottomry loan and premium after the safe arrival of the ship at the end of the risk is 4 per cent. per annum, and a bond by the master of the ship for payment of 10 per cent. per annum interest is not binding on the owners of the ship or cargo, if made without their knowledge.—*The D. H. Bills*, L.R. 4 P.D. 32.
- (xliii.) **P. D. A. Div.**—*Bottomry—Interest.*—Same decision as (xlii.).—*The Sophia Cook*, L.R. 4 P.D. 30.
- (xliv.) **C. A.**—*Charter-party—Demurrage.*—Where the time for unloading is not named in the charter-party, the charterer is bound to provide at the port of discharge sufficient appliances of the kind generally used there for the purpose of unloading.—*Wright v. New Zealand Shipping Co.*, L.R. 4 Ex. D. 165; 40 L.T. 413.



- (xlv.) **C. A.**—*Charter-party—Demurrage—Custom of Port.*—A charter-party provided that the cargo should be discharged with all dispatch according to the custom of the port: *Held*, that the charterer was bound to use reasonable diligence in performing the part of the delivery which fell upon him by the custom of the port, but that he was not bound to take measures to prevent delays arising from the custom of unloading there.—*Postlethwaite v. Freeland*, L.R. 4 Ex. D. 155; 48 L.J. Ex. 353; 40 L.T. 601; 27 W.R. 568.
- (xlvi.) **Ex. Div.**—*Charter-party—Liability—Agents for Charterers.*—In a charter-party which was signed by defendants without any qualification they were described as agents for charterers: *Held*, that they were personally liable for a breach of the charter-party.—*Hough v. Manzanos*, L.R. 4 Ex. D. 104; 48 L.J. Ex. 398; 27 W.R. 536.
- (xlvii.) **C. A.**—*Collision—Limitation of Liability—25 & 26 Vict., c. 63, s. 54.*—A collision having occurred between the S. and the V., both ships were found to blame, and the owners of each ordered to pay half the amount of the damage done to the other. The damage to the V. was £28,000, that to the S., £4,000. The owners of the S. brought an action to limit their liability, in which they paid into Court £5,200 as the extent of their liability: *Held*, that the owners of each ship must prove for the whole moiety of the damage sustained by each ship, and that the limitation of liability must be applied to such total amount of proof, and not to the ultimate balance which would be payable by the S. to the V.—*Chapman v. Royal Netherlands Steam Navigation Co.*, 48 L.J. Ch. 449; 40 L.T. 433; 27 W.R. 554.
- (xlviii.) **P. D. A. Div.**—*Collision—Pilot Vessel—Vessel in Tow—Lights.*—The white mast-head light prescribed by Art. 8 for sailing pilot vessels is not to be carried by them when in tow of another vessel. A sailing vessel towing another vessel is responsible for the lights carried by both vessels.—*The Mary Hounsell*, 40 L.T. 368.
- (xlix.) **P. D. A. Div.**—*Collision—Compulsory Pilotage.*—In an action for damage by collision, when defendants have shown that a pilot, employed compulsorily, was on board their vessel, and that his orders were obeyed, the burden of proving that negligence by some other person contributed to the collision rests with plaintiff, though the defendants have only given in evidence the testimony of the pilot.—*The Marathon*, 48 L.J. P.D.A. 17.
- (l.) **P. D. A. Div.**—*Compulsory Pilotage in Thames—Merchant Shipping Act, 1854, s. 353.*—Pilotage is compulsory on a vessel belonging to the port of London within the river Thames.—*The Hankow*, 48 L.J. P.D.A. 29; 40 L.T. 335.
- (li.) **P. D. A. Div.**—*Co-Ownership—Settlement of Accounts.*—In an action by one co-owner of a ship against the others under sec. 8 of Admiralty Courts Act, 1861, for a settlement of accounts, plaintiff is entitled to a settlement of such accounts only as ought to be rendered to the co-owners prior to the date of the writ.—*The Elder*, 40 L.T. 462.
- (lii.) **Q. B. Div.**—*General Average.*—A ship, after suffering a general average loss, was obliged to put into an intermediate port on her voyage for repairs, in effecting which it was necessary to unload, warehouse, and re-load the cargo. *Held* that expenses incurred in so doing and port dues at and pilotage expenses in leaving the intermediate port were properly treated as general average.—*Atwood v. Sellar & Co.*, L.R. 4 Q.B.D. 342; 27 W.R. 726.
- (liii.) **C. P. Div.**—*Marine Insurance—Set-off—31 & 32 Vict., c. 86, s. 1.*—In an action by the assignee of a policy of marine insurance, the insurers are entitled to set off a debt incurred by the insured for premiums on policies

effected with them prior to the date of the assignment.—*Pellas v. Neptune Marine Insurance Co.*, L.R. 4 C.P.D. 139; 48 L.J. C.P. 370; 40 L.T. 428; 27 W.R. 679.

- (liv.) **C. P. Div.**—*Pilotage Dues*—17 & 18 Vict., c. 104, ss. 357, 363.—The compensation to which a pilot is entitled under sec. 357 of the Merchant Shipping Act, 1854, for being taken beyond the limits of his pilotage, is not recoverable as pilotage dues from the shipbroker under sec. 363.—*Morteo v. Julian*, 48 L.J. M.C. 126.
- (lv.) **P. D. A. Div.**—*Salvage—Damage to Salvor*.—Where a vessel sustains damage in rendering salvage services, without negligence on her part, she is entitled to be repaid for such damage and for demurrage during repairs.—*Mud Hopper*, No. 4, 40 L.T. 462.
- (lvi.) **P. D. A. Div.**—*Salvage—Pilotage*.—A person, whether a pilot or not, who takes charge of a vessel in distress, with the consent of her master, is entitled to salvage reward in the absence of express contract to the contrary.—*The Anders Knape*, 40 L.T. 684.
- (lvii.) **P. D. A. Div.**—*Salvage—Tug and Tow*.—Where, through the negligence of the tug, the tow is placed in a position of danger, the tug is not entitled to any reward for salvage services for extricating the tow, but is liable to re-imburse the tow for loss occasioned to it in being extricated from danger.—*The Robert Dison*, 40 L.T. 333; 27 W.R. 736.

**Solicitor:—**

- (xi.) **Ch. Div. M. R.**—*Lien for Costs—Charging Order*—23 & 24 Vict., c. 127, s. 28.—A charging order under sec. 28 of the Attorneys and Solicitors Act, 1860, may be obtained on summons, and need only be entitled in the action or proceeding in which the property is recovered or preserved.—*Hamer v. Giles*, 48 L.J. Ch. 508.
- (xii.) **Ch. Div. F. J.**—*Lien for Costs—Fund Preserved—Partition*.—By the decree in an action for the recovery of land, plaintiff was declared entitled to one-third of the hereditaments and to an account and payment by defendants of one-third of the rents and profits thereof for the last six years, and the premises were to be sold, and plaintiff's costs to be costs in the action. Before completing the accounts and sale, plaintiff threatened to change his solicitors and to compromise the action. Plaintiff's share of the estate and rents was insufficient to pay his costs: *Held*, on petition by plaintiff's solicitors, that they were entitled only to a lien on plaintiff's share of the property, and to an injunction to prevent plaintiff receiving any money in the action by way of compromise without notice to the solicitors.—*Lloyd v. Jones*, 40 L.T. 514; 27 W.R. 655.
- (xiii.) **Q. B. Div.**—*Uncertificated Solicitor—Costs*—37 & 38 Vict., c. 68, s. 12.—The effect of sec. 12 of Attorneys and Solicitors Act, 1874, is, that no costs are recoverable in any action or proceeding in which an uncertificated solicitor has acted for any party, either by such solicitor or the party employing him.—*Fowler v. Monmouthshire Canal Co.*, L.R. 4 Q.B.D. 334; 48 L.J. Q.B. 457; 27 W.R. 659.

**Trade Mark:—**

- (xi.) **Ch. Div. F. J.**—*Imitation—Deception—Onus of Proof*.—Where one trader takes a substantial part of another's trade mark, the onus of proving that purchasers would not be deceived rests upon the former.—*Orr, Ewing & Co. v. Johnston & Co.*, 40 L.T. 307; 27 W.R. 575.
- (xii.) **Ch. Div. V. C. B.**—*Registration—Words in Foreign Character*.—The regulation issued by the Commissioners of Patents forbidding the registration as a trade mark of any words in foreign characters is *ultra vires* and void.—*Re Rotherham's Trade Mark*, L.R. 11 Ch. D. 250; 40 L.T. 387; 27 W.R. 503.



**Vendor and Purchaser:—**

- (xvii.) **Ch. Div. F. J.**—*Conditions of Sale*.—A sale of real estate took place under the direction of the Court, and one of the conditions required the purchaser to assume the truth of a certain statement of facts. Other facts were subsequently discovered by the purchaser, tending to throw doubt on the title: *Held* that as it appeared that the vendor had fairly stated the facts as they were known to him, and that there was a fair holding title shown, relief could not be granted by either rescinding the sale or directing an open reference as to title.—*Re Banister; Broad v. Munton*, 40 L.T. 319; 27 W.R. 547.
- (xviii.) **C. A.**—*Conditions of Sale—Defective Title—Recision*.—Conditions of sale provided that the title should commence with a conveyance to a railway company, and that the purchaser should assume and admit that everything was done by the company to enable them to sell effectually the land as surplus land, and should not call for evidence to that effect: and that if purchaser failed to comply with the contract his deposit should be forfeited. The purchaser required evidence of a waiver of the right of pre-emption by the adjoining owners, which vendor refused to give, and the purchaser brought an action for the return of his deposit and damages. The vendor then rescinded the contract and obtained a waiver of the right of pre-emption and sold the land to a third party: *Held* that the purchaser was not entitled to any relief.—*Hamon v. Best*, 48 L.J. Ch. 503; 27 W.R. 742.
- (xix.) **Ch. Div. F. J.**—*Covenant for Right of Pre-emption—Perpetuity*.—A deed of conveyance of surface lands in fee contained a covenant that if the vendor, his heirs or assigns, should sell the mines under the adjoining lands, he would offer to the purchaser, his heirs and assigns, the mines under the lands thereby conveyed, and give him the refusal of the same for one month from the time of making the offer at a price named: *Held* that the covenant might be enforced by assignees of the purchaser against devisees of the vendor, and that the offer must be made in writing.—*Birmingham Canal Co. v. Cartwright*, L.R. 11 Ch. D. 421; 27 W.R. 597.
- (xx.) **Ch. Div. F. J.**—*Right of Way—Two Ways*.—A contract to sell land and houses with the appurtenances contained no provision with regard to any right of way. The property was approached by two roads, both of which passed over land of the vendor: *Held* that the purchaser was only entitled to a right of way over one road, and that vendor might select which road he would grant a right of way over.—*Bolton v. London School Board*, 48 L.J. Ch. 467; 40 L.T. 582.
- (xxi.) **H. L.**—*Specific Performance*.—Decision of Court of Appeal (see *Vendor and Purchaser* ii., p. 37) affirmed on different grounds, the Court holding that though the stipulation for the approval of the title by their solicitors made by the purchasers did not introduce a new term, the subsequent negotiations showed that a completed contract had not been come to.—*Hussey v. Horne Payne*, 27 W.R. 585.
- (xxii.) **C. A.**—*Specific Performance—Statute of Frauds*.—Plaintiff, in a letter to defendant, stated that he thereby agreed to purchase some land for £310, and to pay a deposit of £31. Defendant's name was not mentioned in the letter, but he signed a receipt for the £31 as a deposit on the purchase of the land: *Held* that there was a sufficient contract in writing within the Statute of Frauds.—*Long v. Millar*, 27 W.R. 720.

**Water:—**

- (v.) **Ex. Div.**—*Navigable River—Obstruction—Conservators*.—The conservators of an ancient navigable river were authorised by statute, at their discretion, to cleanse the channel of the river and remove obstructions:

*Held* that they were not liable for damage caused by a pile negligently left in the river so as to injure a barge.—*Forbes v. Lee Conservancy Board*, L.R. 4 Ex. D. 116; 48 L.J. Ex. 402; 27 W.R. 688.

**Will :—**

- (lxii.) **C. A.**—*Annuity—Deficiency of Income—Arrears out of Corpus.*—Decision of V. C. H. (see *Will.* iii., p. 38) reversed.—*Gee v. Mahood*, 40 L.T. 663.
- (lxiii.) **Ch. Div. F. J.**—*Apportionment—Clear and Undisposed of Rents*—33 & 34 Vict., c. 35.—By a will, dated before the Apportionment Act, 1870, testator, after disposing of his personal estate, made a gift of the clear and undisposed of rents of certain estates to trustees for a term after his death, and by a codicil, subsequent to the Act, confirmed his will: *Held* that the clear and undisposed of rents included only the rents accrued since testator's death, and that the apportioned rents up to his death belonged to the personal estate.—*Constable v. Constable*, 40 L.T. 516.
- (lxiv.) **Ch. Div. F. J.**—*Construction.*—Testator directed his executors to take a house for his three daughters to live in with their governess: *Held* that the daughters were entitled to the money which ought to have been expended in taking a house for them during their minorities. Testator gave residuary real and personal property to trustees in trust out of the rents and profits of realty and out other moneys to form a fund to be applied in establishing his three sons in professions. One son only had adopted a profession: *Held* that the sons were entitled to the residue in equal shares. A gift of household furniture and effects of all kinds, followed by a gift of "all my other real and personal estate:" *Held* to include only household furniture and effects, *ejusdem generis*.—*Hutchinson v. Rough*, 40 L.T. 289.
- (lxv.) **Ch. Div. F. J.**—*Construction—Charge of Debts—Mortgage—Legacy*—17 & 18 Vict., c. 113; 30 & 31 Vict., c. 69.—Testator, after giving certain realty and personalty in trust for his wife, gave all his residuary estate upon trust for sale, and out of the proceeds to pay debts, including debts due upon mortgage of any of the property the enjoyment whereof was secured to his wife; and he then gave legacies to his executors: *Held* that mortgages on the residuary real estate must be borne by the produce of sale of such estate exclusively, and that the legacies to the executors were charges on the real and personal estates *pro rata*.—*Elliot v. Dearsley*, 40 L.T. 548.
- (lxvi.) **Ch. Div. F. J.**—*Construction—Exoneration.*—Subject to the payment of his debts and certain legacies previously given, testator gave his real and residuary personal estate to trustees in trust for A. A. died in testator's lifetime: *Held* that the personal estate was primarily liable for payment of debts and legacies.—*Wells v. Row*, 48 L.J. Ch. 476; 40 L.T. 715.
- (lxvii.) **C. A.**—*Construction—Life Estate by Implication.*—Testator gave all his property to trustees in trust for payment of debts, with power to sell, and he directed that after the death of his wife and payment of all debts and legacies the residue should be divided amongst children of his aunts, the descendants of those who might have died being entitled to the benefit which their deceased parent would have received had he been alive: *Held* that the wife did not take a life estate by implication, and that all descendants of the children of testator's aunts living at the period of distribution were entitled *per stirpes*.—*Ralph v. Carrick*, 40 L.T. 505.
- (lxviii.) **H. L.**—*Construction—Next-of-Kin.*—Bequest among testator's daughters for life with remainder to their children respectively, and

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- (lxix.) **Ch. Div. M. R.**—*Construction—Specific Chattels—Power to appropriate.*—Gift of plate to trustees to permit testator's widow to appropriate absolutely such parts as she should signify in writing her desire to have: *Held* that the widow was entitled to all the plate.—*Arthur v. Mackinnon*, L.R. 11 Ch. D. 385; 27 W.R. 704.
- (lxx.) **Ch. Div. V. C. H.**—*Construction—Vesting—Maintenance.*—Bequest, after death of A. and his wife, on trust to apply the interest of the fund, or so much as the trustees should think proper, for the maintenance of A.'s children during their minorities, and on their attaining twenty-one to divide the principal and accumulations equally among them; in default of children to A. absolutely: *Held* that the gift to the children was contingent on their respectively attaining twenty-one.—*Re Grimshaw's Trusts*, L.R. 11 Ch. D. 406; 48 L.J. Ch. 399; 27 W.R. 514.
- (lxxi.) **C. A.**—*Conversion—Election.*—An estate was devised to trustees on trust to sell, and half the proceeds belonged to the wife of one of the trustees for her separate use, and the other moiety belonged to another trustee. The trustees did not sell the property, but granted various leases of part of it, and they also opposed a bill for a projected railway which would pass through the estate, and stated in their petition that they intended to lay out the estate for building. The trustee's wife died in her husband's lifetime: *Held* that her share went to her heir-at-law as realty.—*Martin v. Trimmer*, L.R. 11 Ch. D. 341.
- (lxxii.) **Ch. Div. M. R.**—*Perpetuity—Restraint on Anticipation.*—Gift of fund to a person for life, and after her decease to her surviving children, accompanied as to daughters and female issue with a restraint on anticipation: *Held* that the restraint was bad as infringing the rule against perpetuities.—*Buckton v. Hay*, 27 W.R. 527.

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- (xxiii.) **C. A.**—*Priority—Secured Creditor—Judicature Act, 1873, s. 25, sub-sec. 1.*—Sec. 25, sub-sec. 1 of Judicature Act, 1873, did not take effect on the passing of that Act, and was therefore postponed by the Suspending Act of 1874.—*Sherwen v. Selkirk*, 40 L.T. 701.

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- (iv.) **Ch. Div. F. J.**—*Agency—Following Money.*—A firm at S. sent to a bank at C. average orders to collect and pay the proceeds to bankers in London. The bank collected the orders, and received a cheque for one and cash for the others, which they paid into their till. They stopped payment and went into liquidation: *Held* that the cheque could be followed by the firm at S., but not the money—*Ex parte Dale, Young & Co., Re West of England Bank*, 40 L.T. 712.

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- (ci.) **C. J. B.**—*Partnership—Joint and Separate Creditors.*—A partnership agreement between A. and B. provided that certain machinery should remain the property of A. A. died, having by his will appointed B. and others trustees and empowered them to carry on the business and employ any part of his estate in doing so. The business was carried on for ten years, when B. filed a liquidation petition: *Held* that the machinery was a joint asset of A. and B., and divisible among their joint creditors. —*Ex parte Manchester and County Bank, Re Mellor*, 40 L.T. 723.

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- (vi.) **Ch. Div. V. C. B.**—*Infringement—Assignment*—8 Geo. II., c. 13.—The copying the design of a copyright engraving by a chromo-printed pattern for wool-work is an infringement. A written assignment is not necessary to establish the right of the assignee to the penalties under 8 Geo. II., c. 13, for piracy.—*Dicks v. Brooks*, 40 L.T. 710.

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- (ccliii.) **C. A.**—*Costs—Counter-claim*—30 & 31 Vict., c. 142, s. 5—*Judicature Act*, 1873, s. 67.—A claim for £97 and counter-claim for £24 were referred to a master, the costs to abide the event of the reference, and he certified that £16 was due on the claim and £23 on the counter-claim: *Held* that plaintiff must pay defendant's costs both on the claim and counter-claim.—*Chatfield v. Sedgwick*, 27 W.R. 790.
- (cclix.) **Ex. Div.**—*Costs—Payment in Satisfaction of Claim.*—Where a defendant paid a sum into Court in satisfaction of plaintiff's claim, and the issues were afterwards referred to an official referee, who reported that the sum paid in was sufficient, the Court allowed plaintiff his costs up to the payment into Court.—*Buckton v. Higgs*, 27 W.R. 803.
- (cclv.) **Q. B. Div.**—*Dismissal for want of Prosecution—Summons for Extension of Time.*—An order was made dismissing an action for want of prosecution unless plaintiff delivered a statement of claim within fourteen days. Plaintiff took out a summons for extension of time returnable on the last of the fourteen days, and it was adjourned by consent: *Held* that the action came to an end on the last of the fourteen days.—*King v. Davenport*, 27 W.R. 798.
- (ccarvi.) **Q. B. Div.**—*New Trial—Insufficient Damages.*—In an action for personal injury a new trial will be granted where the damages awarded by the jury are unreasonably small.—*Phillips v. L. & S. W. Rail. Co.*, 27 W.R. 797.
- (cclvii.) **Ch. Div. F. J.**—*Pleading—Wilful Default.*—In an administration action in which there were no pleadings affidavits were filed by the surviving partners of the testator raising a case of fraud against him. On a summons by the partners eight years afterwards an account was ordered of all sums in which the testator or his estate was indebted to the partners for sums fraudulently retained or improperly applied by him.—*Barber v. Mackrell*, 27 W.R. 794.
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- (lviii.) **C. P. Div.**—*Marine Insurance—Insurable Interest.*—D. having undertaken to transport the Cleopatra Obelisk to England, expended £4,000 in constructing a vessel to carry it and providing for its transport. He insured the obelisk and vessel with one underwriter for £2,000 and another for £1,000, and the policies provided that the vessel and obelisk should be valued by agreement at £4,000. On the way to England the obelisk incurred salvage liabilities, and the salvors were awarded £2,000, the obelisk being valued at £25,000: *Held* that the insurers were liable to repay D. the £2,000 in amounts proportionate to their policies.—*Dixon v. Whitworth*, 40 L.T. 718.

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